Supreme Court, U.S.
FILED

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No.

In the Supreme Court of the United States

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION; BFI WASTE SYSTEMS OF NORTH AMERICA, INC.; BFI WASTE SYSTEMS OF MISSISSIPPI, LLC; AND WASTE MANAGEMENT OF MISSISSIPPI, INC.

Petitioners,

v.

PINE BELT REGIONAL SOLID WASTE MANAGEMENT AUTHORITY AND ITS BOARD OF COMMISSIONERS, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

CHARLES A. ROTHFELD
Counsel of Record
EVAN M. TAGER
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

QUESTIONS PRESENTED

Several Mississippi counties and municipalities enacted flow control ordinances requiring that all municipal and commercial solid waste generated within those jurisdictions be transported to particular local facilities for disposal. Petitioners, waste disposal firms that participate in a national market for waste disposal services, challenged the constitutionality of these ordinances under the Commerce Clause. Against this background, the questions presented are:

1. Whether the Fifth Circuit erred in holding – in conflict with the First and Ninth Circuits – that, because petitioners did not transport waste from the enacting jurisdictions across state lines, they lacked standing under the "zone of interests" test to contend that the flow control ordinances unconstitutionally discriminate against interstate commerce.

2. Whether the Fifth Circuit erred in holding – in conflict with the Fourth, Sixth, Eighth, and Tenth Circuits – that a plaintiff bringing a Commerce Clause challenge under the balancing test of *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970), must show that the challenged law has the effect of discriminating against interstate commerce.

RULES 14.1 AND 29.6 STATEMENT

The parties to the proceeding in the United States Court of Appeals for the Fifth Circuit were National Solid Wastes Management Association; BFI Waste Systems of North America, Inc.; BFI Waste Systems of Mississippi, LLC; Waste Management of Mississippi, Inc.; Pine Belt Regional Solid Waste Management Authority and its Board of Commissioners; Covington County, Mississippi; Jones County, Mississippi; Perry County, Mississippi; City of Petal, Mississippi; City of Laurel, Mississippi; City of Hattiesburg, Mississippi; and Mike Moore, in his capacity as Attorney General of Mississippi.

Pursuant to Rule 29.6, petitioners state that Waste Management of Mississippi, Inc., is wholly owned by Waste Management Holdings, Inc., which in turn is wholly owned by Waste Management, Inc. BFI Waste Systems of North America, Inc., is wholly owned by Browning-Ferris Industries LLC. The sole member of BFI Waste Systems of Mississippi, LLC, is Allied Waste North America, Inc.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (App. *infra*, 1a-20a) is reported at 389 F.3d 491. The opinion of the United States District Court for the Southern District of Mississippi (App., *infra*, 21a-33a) is unreported. The order of the court of appeals denying rehearing (App., *infra*, 34a-35a) is unreported.

JURISDICTION

The order of the court of appeals denying rehearing was entered on January 5, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Commerce Clause of the United States Constitution provides in relevant part:

> The Congress Shall have the Power * * * To Regulate Commerce * * * among the several States.

STATEMENT

This case involves a constitutional challenge to so-called "flow control ordinances," which require that all solid waste generated within the enacting jurisdictions be disposed of at particular local facilities. Petitioners are companies that dispose of waste that is generated within the relevant jurisdictions. Although petitioners participate in a national market for waste disposal services, the Fifth Circuit held in this case that, because petitioners did not transport waste from those jurisdictions across state lines at the time of trial, the "zone of interests" doctrine denies them standing to contend that the challenged ordinances discriminate against interstate commerce – a decision that the court acknowledged to conflict

with the holdings of two other circuits. The court below also held on the merits that a challenged regulation of commerce will be found to fail the familiar Commerce Clause balancing test of *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970), only if the regulation effectively *discriminates* against interstate commerce. This conclusion also conflicts with the holdings of other courts of appeals. Because the decision below departs from the approach taken by this Court, exacerbates significant confusion in the lower courts, and involves recurring issues of considerable practical importance, further review is warranted.

1. The respondents in this case are several Mississippi counties and municipalities that are members of the Pine Belt Regional Solid Waste Management Authority ("the Authority"). In 1996, the Authority issued bonds to finance the construction of a landfill and three "transfer stations," where waste could be unloaded pending transfer to the landfill for disposal. That same year, the Authority contracted with a local company to operate the landfill and transfer stations. The Authority raises revenue by collecting fees for the disposal of waste at these locations. In the event the Authority is unable to generate sufficient income to satisfy its bonded indebtedness, the member governments are obligated to make up the shortfall. App., *infra*, 2a-4a.

From the time the Authority commenced operations, the volume of waste processed at its facilities has fallen short of projections. Concerned that its revenues accordingly might be insufficient to satisfy its bond payment obligations, in 2002 the Authority directed its member governments to adopt flow control ordinances, which require that *all* municipal and commercial solid waste generated within those jurisdictions be transported to the Authority's landfill or transfer stations for disposal. See generally *C & A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383, 386 (1994) (describing operation of flow control ordinances). Each member gov-

ernment in turn enacted an identical ordinance imposing this requirement. App., *infra*, 4a-5a. Noncompliance with the requirements of the ordinances is classified as a misdemeanor. *Ibid.*

Petitioners are companies that collect, process, and dispose of waste throughout the State of Mississippi and most of the United States (and a trade association representing those companies); at the time of trial, the waste they collected within the Authority's borders was transported to landfills located in Mississippi but *outside* of the Authority's boundaries. Petitioners have "numerous private contracts for the collection and disposal of commercial solid waste within the geographic boundaries of the Authority." App., *infra*, 23a. The flow control ordinances would interfere with this business, prohibiting petitioners "from disposing of solid waste collected within the Authority at their own facilities or any other public or private facility outside of the Authority." *Ibid.* Petitioners therefore commenced this suit in the Southern District of Mississippi against the Authority and its members, contending that the flow control ordinances violate the Commerce Clause of the U.S. Constitution.

2. Following a trial, the district court held that the ordinances are unconstitutional for two separate reasons. App., *infra*, 21a-33a. First, the court held the case controlled by *Carbone*, in which this Court ruled that a very similar flow control ordinance violated the Commerce Clause. The district court reasoned that here, as in *Carbone*, "[t]he Authority has drawn a ring around itself. Solid waste collected within that ring must be processed at its preferred transfer stations and landfill. These flow control ordinances prevent everyone except the favored local operator from processing solid waste collected within [the Authority's] boundaries and deprives outside access to the local waste disposal market." *Id.* at 29a.

The court added that "the defendants have failed to demonstrate that they had no other means to advance their admitted objective: the generation of adequate revenue to meet their financial obligations. In fact, the trial evidence showed that defendants could have promoted financial viability through increases in taxes, through the imposition of franchise fees or by increasing the amount of solid waste processed at its facilities by accepting solid waste from municipalities outside of the Authority." App., *infra*, 29a (footnote omitted).[1]

Alternatively, the court held that, even if the ordinances are deemed non-discriminatory within the meaning of *Carbone*, they must be invalidated under the *Pike* balancing test because they "impose[] an excessive burden [on interstate commerce] in relation to the putative local benefits." App., *infra*, 31a. Here, the district court relied on Justice O'Connor's concurring opinion in *Carbone*, which concluded that the flow control ordinance there at issue was unconstitutional under *Pike*. In reaching this conclusion, the district court found that "the Authority could have undertaken alternative steps to insure its economic interests without resorting to solid waste flow control. In addition, defendants introduced no evidence at trial which tended to

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[1] The district court rejected the defendants' contention that this case could be distinguished from *Carbone* on the ground that the waste disposal facilities here are publicly owned. The court noted that the Fifth Circuit has not recognized a constitutional difference between publicly and privately owned facilities and that, in any event, the private contractor here had been given "complete control over the operation and maintenance of the landfill and transfer stations" and "the Authority has given no indication that it intends to assume the operation of its facilities." App., *infra*, 30a. The court of appeals did not address the validity of this holding; the issue would be considered by that court on remand if petitioners prevail in this Court.

demonstrate that environmental or public health concerns were the motivating force behind enactment of these flow control ordinances." *Id.* at 32a. The court therefore held that, "even under the less rigorous *Pike* test, defendants' solid waste flow control ordinances fail." *Ibid.*

3. On appeal, the Fifth Circuit set aside the district court's judgment. App., *infra*, 1a-20a. The court of appeals' decision rests predominantly on a ground that the court raised *sua sponte*: it ruled that petitioners lack standing to argue that the ordinances unconstitutionally discriminate against interstate commerce. The court acknowledged that petitioners satisfy *constitutional* standing requirements because they have suffered an "injury (higher operating costs) that is traceable to the ordinances enacted by defendants and which would be remedied if we rule that the ordinances are unconstitutional." *Id.* at 11a. But the court held that petitioners run afoul of "prudential standing requirements" (*ibid.*) – and, in particular, that "plaintiffs' injury does not fall within the zone of interests to be protected by the dormant Commerce Clause with respect to ordinances that are alleged to facially discriminate against out-of-state economic interests." *Id.* at 13a.

That is so, the court reasoned, because "*these* plaintiffs do not ship (and, so far as the record shows, have never shipped) *any* waste they collect within the Region [governed by the ordinances] to any location outside of Mississippi, nor do they ship (and, so far as the record shows, have never shipped) any waste from outside of Mississippi to the Region." App., *infra*, 13a (emphasis in original).[2] Thus, "plain-

[2] The court noted that Stone County, Mississippi, has voted to join the Authority, although the contract between the two had not been finalized at the time of trial. The court also recognized that waste collected by one of the petitioners in Stone County is currently shipped to a landfill in Alabama. But the court declined to "consider the fact that waste from Stone County is actually shipped out

tiffs do not have standing to challenge the ordinances on the basis of a claim that they are facially discriminatory against out-of-state interests." *Id.* at 14a.

In so holding, the panel expressly recognized that

> [o]ur conclusion that plaintiffs do not meet the prudential standing requirement differs from that in two opinions from our sister circuits. *See On the Green Apartments LLC v. City of Tacoma*, 241 F.3d 1235 (9th Cir. 2001); *Houlton Citizens' Coalition v. Town of Houlton*, 175 F.3d 178 (1st Cir. 1999). In *On the Green* and *Houlton,* the plaintiffs did not allege that they disposed of their waste out of state or that they had plans to do so. *On the Green*, 241 F.3d at 1241-40 [*sic*]; *Houlton*, 175 F.3d at 183. Nevertheless, both the Ninth Circuit and the First Circuit concluded that the plaintiffs met the prudential standing requirements.

App., *infra*, 14a n.16. But the Fifth Circuit "disagree[d] with the analysis" used by the Ninth and First Circuits. *Ibid.*

In contrast, the court of appeals held that petitioners *do* have standing to contend that the ordinances are unconstitutional under the *Pike* balancing test on the theory that they impose "an excessive burden on interstate commerce."[3]

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of state" because the County has not yet enacted a flow control ordinance and is not a party to this suit. App., *infra*, 13a n.14.

[3] In finding that petitioners have standing to make this argument, the court explained that, "[e]ven though plaintiffs do not ship any garbage collected in the Region out of state, they are engaged in interstate commerce, and *their* interstate commerce is allegedly burdened by the ordinances." App., *infra*, 15a (emphasis in original). The court noted that some of petitioners' contracts are negotiated on an interstate basis and that an increase in costs in Mississippi could affect petitioners' competitive standing in other states. *Id.* at 15a-16a & n.18.

App., *infra*, 15a. But the court proceeded to reject this constitutional argument on the merits. In the court's view, a state rule may be held invalid under *Pike* only if the challenging party "show[s] that the regulation has 'a disparate impact on interstate commerce.'" *Id.* at 18a (citation omitted). "The 'incidental burdens to which *Pike* refers are the burdens on interstate commerce *that exceed the burdens on intrastate commerce*.' * * * 'Where a regulation does not have this disparate impact on interstate commerce, then we must conclude that ... [it] has not imposed any incidental burdens on interstate commerce' and, therefore, that it passes the *Pike* test." *Ibid.* (citations omitted; ellipses and bracketed material added by the court) (emphasis added). The ordinances challenged here pass that test, the panel concluded, because "[t]he burdens imposed by the ordinances on interstate commerce * * * are no greater than those imposed on *intrastate* commerce." *Ibid.* (emphasis in original).

REASONS FOR GRANTING THE PETITION

This case arises in an area of great practical importance: many jurisdictions have enacted (or are contemplating enactment of) flow control ordinances, which have been the subject of a considerable volume of litigation. See generally *Carbone*, 511 U.S. at 407 (O'Connor, J., concurring in the judgment); *SSC Corp.* v. *Town of Smithtown*, 66 F.3d 502, 504-505 (2d Cir. 1995). The legal issues presented here, meanwhile, are recurring and very significant ones. Disagreement about the contours of the zone of interests test has led to an acknowledged conflict in the circuits. And questions about the application of the *Pike* standard arise with great frequency in a wide range of contexts. Because the resolution of these issues by the Fifth Circuit contributes to a growing disarray in the courts of appeals – and because the holding below is inconsistent with decisions of this Court – review of the decision below is in order.

I. THE FIFTH CIRCUIT'S NOVEL STANDING ANALYSIS DEPARTS FROM THE HOLDINGS OF OTHER COURTS OF APPEALS AND OF THIS COURT

Although petitioners operate in a national market for waste disposal services, the Fifth Circuit held that, because they did not move waste generated within the Authority's boundaries across state lines, they lack standing under the zone of interests doctrine to contend that the challenged flow control ordinances discriminate against interstate commerce. That holding conflicts with the decisions of other courts of appeals and contributes to a growing disarray in the lower courts about the meaning of the zone of interests requirement. This Court itself has recognized that "[t]he 'zone of interest' formula * * * has not proved self-explanatory." *Clarke* v. *Sec. Indus. Ass'n*, 479 U.S. 388, 396 (1987). The result, as commentators have noted, is that "[t]he divergence of rules emanating from the Supreme Court appears to have left the lower courts somewhat rudderless and to have produced a system in which different categories of plaintiffs receive unfairly differing treatment." Siegel, *Zone of Interests*, 92 GEO. L.J. 317, 341 (2004). This Court should grant review to resolve the acknowledged circuit conflict and provide guidance on this important, recurring issue.

A. The Fifth Circuit's Standing Decision Conflicts With That Of Other Courts Of Appeals

To begin with, as the court below itself recognized, its holding that petitioners lack standing squarely conflicts with the decisions of other courts of appeals. On this, the Fifth Circuit plainly was correct: other circuits have held the zone of interests requirement to be satisfied in circumstances identical to those in this case.

Thus, in *Houlton*, the First Circuit held that a local hauler of waste had standing to contend that a flow control ordinance discriminated against interstate commerce, explaining: "As a classic plaintiff asserting his own economic interests under the Commerce Clause – a constitutional provision specifically targeted to protect those interests – [plaintiff] avoids any concerns relative * * * to the zone of interests requirement." 175 F.3d at 183. Of particular relevance here, the First Circuit added that the plaintiff's "claim to standing is not damaged because he failed to allege that he hauled garbage out-of-state or planned to do so. In Commerce Clause jurisprudence, cognizable injury is not restricted to those members of the affected class against whom states or their political subdivisions ultimately discriminate." *Ibid.*

Similarly, in *On the Green Apartments* the Ninth Circuit held that a local hauler satisfied the zone of interests requirement and had standing to challenge Tacoma's flow control ordinance, even though the hauler sought to dispose of trash generated in Tacoma at landfills that were outside the city but *within* Washington State. See 241 F.3d at 1237, 1241. Writing for the majority, Judge O'Scannlain explained:

> [the plaintiff's] injury would be remedied if it could take its garbage outside the city. * * * As [plaintiff's] injury is thus related to the purposes underlying the Commerce Clause, it has satisfied the prudential component of standing with respect to its challenge to Tacoma's requirement that self-haulers tip at the city dump.

Ibid.[4]

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[4] The court below expressed the view that the Ninth Circuit erred by holding that the *On the Green* plaintiff fell within the zone of interests protected by the Commerce Clause "when the court concluded [on the merits] that the case *did not even implicate the Commerce Clause*." App., *infra*, 14a n.16 (emphasis in original).

Although not cited by the decision below, the Eighth Circuit is aligned with the First and Ninth. In *Ben Oehrleins & Sons & Daughter, Inc.* v. *Hennepin County*, 115 F.3d 1372 (8th Cir. 1997), the plaintiffs challenging Hennepin County's flow control ordinance included "[l]ocal" waste haulers and landfills. *Id.* at 1376, 1378. There was no indication that all of these entities moved waste interstate (or received it from out-of-state). Yet the court found "no question that the *Oehrleins* plaintiffs, that is, various waste haulers and processors, have standing. * * * [W]e see no prudential barriers to standing for the *Oehrleins* plaintiffs." *Id.* at 1379. Courts in the Eighth Circuit understand this holding to mean that "the *Oehrleins* court must have been satisfied that *each* plaintiff had standing to challenge a restriction on out-of-state transportation of waste, regardless of whether it actively engaged in the activity or not." *Randy's Sanitation, Inc. v. Wright*

But it is the Fifth Circuit's reasoning that was confused. That the plaintiffs ultimately lost on the merits did not mean that their claims were outside the zone of interests "arguably" protected by the provision they invoked. That was the case, for example, in *Clarke*, in which this Court held that the plaintiff had standing to advance its claims before *rejecting* those claims on the merits. See 479 U.S. at 404-408. Cf. *Steel Co.* v. *Citizens for a Better Env.*, 523 U.S. 83, 89 (1998) (court has jurisdiction unless claim on merits is wholly insubstantial). The Ninth Circuit was well aware of this distinction: indeed, it held that waste generators – unlike waste haulers – *lacked* standing under the zone of interests doctrine to invoke the Commerce Clause in arguing that they should be permitted to haul their own waste. This was so because, in contrast to the hauler's challenge to geographic restrictions on the movement of waste, a generator's complaint that it "was forced to pay for waste disposal services it would like to provide for itself" invoked "interests [that] are, at best, marginally related to ... the purposes implicit in the dormant Commerce Clause." *On the Green*, 241 F.3d at 1240-1241 (internal quotation marks and citations omitted; ellipses added by the court).

County, 65 F. Supp. 2d 1017, 1024 (D. Minn. 1999) (emphasis added).

This acknowledged conflict in the circuits may be attributable to a certain lack of clarity in this Court's zone of interests case law. The Court itself noted, in its most recent significant decision in this area, that its "prior cases have not stated a clear rule for determining when a plaintiff's interest is 'arguably within the zone of interests.'" *Nat'l Credit Union Admin.* v. *First Nat'l Bank & Trust Co.*, 522 U.S. 479, 488 (1998). Indeed, while the Court has listed the zone of interests test "among other prudential standing requirements of general application" (*Bennett* v. *Spear*, 520 U.S. 154, 163 (1997)), virtually all of the decisions in which the Court has applied the test involved the review of agency action under Section 10 of the Administrative Procedure Act, 5 U.S.C. § 702. That fact has led the Court to suggest that "the test is most usefully understood as a gloss on the meaning of § 702." *Clarke*, 479 U.S. at 400 n.16. See *id.* at 395.

In contrast, the Court has provided essentially no guidance to the lower courts on application of the test in cases – like this one – that do *not* involve APA review, leaving commentators to question "what role remains for the zone of interests test in constitutional cases" and to note "the difficulty of developing a workable zone of interests analysis in constitutional cases that would add coherence and consistency to the law." Kelso & Kelso, *Standing to Sue: Transformations in Supreme Court Methodology, Doctrine and Results*, 28 U. TOL. L. REV. 93, 146 (1996).[5] This history has

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[5] The Court appears to have invoked the zone of interests doctrine in a constitutional case only once, in *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318, 320 n.3 (1977), holding that plaintiffs complaining of discriminatory taxation *were* arguably within the zone of interests protected by the Commerce Clause. Subsequently, however, while stating that "the decision that there

left much of the zone of interests doctrine "a mystery" and the law in a "confused state." Siegel, 92 GEO. L.J. at 317, 319. In these circumstances, further review plainly is in order.

B. The Decision Below Misunderstands The Purposes Of The Zone Of Interests Requirement

We submit that the Fifth Circuit's departure from the holdings of other courts of appeals is attributable to its failure to consider the purposes served by the zone of interests requirement. That prudential limit on standing is addressed to "the concern that the plaintiff be 'reliable,'" and thus "seeks to exclude those plaintiffs whose suits *are more likely to frustrate than to further statutory objectives*." *Clarke*, 479 U.S. at 397 n.12 (emphasis added). The zone of interests doctrine therefore is a basis for denying standing when "the plaintiff's interests are * * * marginally related to or inconsistent with the purposes implicit" in the relevant statute or constitutional provision. *Id.* at 399. This Court has emphasized that, in applying the test, it has "struck the balance in a manner favoring review" and that the zone of interests doctrine "is not meant to be especially demanding." *Id.* at 397, 399. Against this background, the court of appeals' holding that petitioners' discrimination argument falls outside the Commerce Clause zone of interests is wrong, for several reasons.

First, because the zone of interests requirement is designed to ensure that the plaintiff has a concrete interest in pursuing its challenge, a claim generally will fall outside the relevant zone of interests only "where the plaintiff is not it-

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was standing in *Boston Stock Exchange* was undoubtedly correct," the Court cautioned (without elaboration) that the zone of interests doctrine "is not a test of universal application." *Clarke*, 479 U.S. at 400 n.16.

self the subject of the contested regulatory action." *Clarke*, 479 U.S. at 399. That was the situation in the only case in which this Court has held a plaintiff to fail the zone of interests test. See *Air Courier Conference of Am. v. Am. Postal Workers Union*, 498 U.S. 517 (1991) (postal employees lack standing to challenge regulation suspending Postal Service monopoly over certain international operations). But here, of course, petitioners *are* directly regulated by the challenged flow control ordinances.

Second, petitioners unquestionably are "reliable" plaintiffs whose litigation of this case is much more likely to further than to frustrate the objectives of the Commerce Clause. Their goal is identical to that of entities that move waste interstate: all such businesses will benefit equally if limits on the free movement of waste generated within the boundaries of the Authority are removed. Petitioners thus "certainly have an interest" in enforcing the Commerce Clause anti-discrimination policy at issue here. *Nat'l Credit Union Admin.*, 522 U.S. at 493-494. As the Fifth Circuit recognized, petitioners "are engaged in interstate commerce" (App., *infra*, 15a); their business is part of a national market in waste disposal services, and there is every reason to believe that petitioners will benefit in the future from a rule invalidating limitations on the interstate movement of waste generated within the boundaries of the Authority. See generally *id.* at 13a n.14. Indeed, businesses like petitioners, which want to be able to respond immediately to changes in the market or in local conditions that make it desirable to send waste across state lines, have a concrete interest in the invalidation of rules that make the interstate transportation of waste illegal.[6] Petitioners therefore "are very reasonable candidates" to advance

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[6] One petitioner currently moves waste from within the boundaries of an Authority member in interstate commerce, but that member has not enacted a flow control ordinance.

Commerce Clause anti-discrimination arguments. *Clarke*, 479 U.S. at 403.

That is particularly so because this Court has never required a plaintiff asserting a claim of discrimination against interstate commerce to show that the challenged state law actually succeeded in discouraging such commerce. Instead, "[o]nce a state [law] is found to discriminate against out-of-state commerce, it is typically struck down without further inquiry." *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 342 (1992). See, *e.g.*, *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 578 (1997). Petitioners' argument therefore should not be barred simply because they cannot say that, absent the flow control ordinances, waste would immediately be transported out of state.

Third, the court of appeals' holding that petitioners have standing to argue "impermissible burden" under *Pike* but not "improper discrimination" under the Commerce Clause draws a distinction that is artificial and ultimately unmanageable. "[T]here is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the category subject to the *Pike* v. *Bruce Church* balancing approach." *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986). Yet the court below has attempted to draw a "clear line" that segregates the types of *arguments* that may be made in challenging such statutes. Perhaps because such a distinction is unworkable, we are not aware of any decision of this Court that uses prudential standing rules to limit the arguments that may be made by a plaintiff who concededly is entitled to invoke the Commerce Clause in a challenge to the constitutionality of a state law.

Indeed, in this respect the Fifth Circuit's holding is in severe tension with *Carbone* itself. The plaintiffs in *Carbone* were "in-town processors" that were "physically located *in*

Clarkstown." 511 U.S. at 404 (O'Connor, J., concurring in the judgment) (emphasis in original). See *id.* at 387-388 (majority opinion). Yet a central aspect of the Court's rationale in *Carbone* was that the ordinance "deprive[d] *out-of-state businesses* of access to a local market" (*id.* at 389 (emphasis added)); the Court held that "[t]he essential vice in laws of this sort" is that "*[o]ut-of-state* [processors] * * * are deprived of access to local demand for their services." *Id.* at 392 (emphasis added). See *ibid.* (ordinance left "no room for investment from outside"). Thus, although not directly addressing the standing issue, this Court quite plainly did not believe that the local plaintiffs in *Carbone* were precluded from advancing arguments that were inapplicable to those plaintiffs' immediate factual circumstances. The Court should grant review to address the Fifth Circuit's contrary conclusion here.

II. THE PANEL'S APPLICATION OF *PIKE* IS INCONSISTENT WITH DECISIONS OF OTHER COURTS OF APPEALS AND OF THIS COURT

The court of appeals also went astray in its application of the *Pike* test. This Court has understood *Pike* to stand for the proposition that a state regulation with "'only incidental'" effects on interstate commerce will be invalidated if "'the burden imposed on such commerce [by the regulation] is clearly excessive in relation to the putative local benefits.'" *Edgar* v. *MITE Corp.*, 457 U.S. 624, 640 (1982) (quoting *Pike*, 397 U.S. at 142). The court of appeals, however, modified this test so that the balance between local benefits and the burden on commerce is immaterial unless "the challenging party" *also* is able to "show that the regulation has 'a *disparate impact* on interstate commerce.'" App., *infra*, 18a (quoting *Automated Salvage Transp., Inc. v. Wheelabrator Envtl. Sys., Inc.*, 155 F.3d 59, 75 (2d Cir. 1998) (emphasis added)). The court below thus held that

> [t]he "incidental burdens to which *Pike* refers are the burdens on interstate commerce *that exceed the burdens on intrastate commerce*." * * * "Where a regulation does not have this disparate impact on interstate commerce, then we must conclude that ... [it] has not imposed any incidental burdens on interstate commerce" and, therefore, that it passes the *Pike* test.

Ibid. (quoting *Automated Salvage Transport*, 155 F.3d at 75) (emphasis added). In several significant respects, however, the Fifth Circuit's holding that a party invoking *Pike* must show that the challenged law has a discriminatory effect on interstate commerce departs from the rule announced by this Court and directly conflicts with the holdings of other courts of appeals.

A. The *Pike* Test Does Not Require Proof Of A Disparate Impact On Interstate Commerce

At the outset, this Court has *never* indicated that a disparate impact on interstate commerce is any part of the *Pike* test. Quite the contrary: the Court consistently has stated that it is precisely when a state rule "regulates *evenhandedly*" that the *Pike* balancing approach comes into play. *Brown-Forman*, 476 U.S. at 579 (emphasis added). See *MITE Corp.*, 457 U.S. at 643, 644-646; *Pike*, 397 U.S. at 142. Perhaps the clearest proof of this pudding may be found in Justice O'Connor's concurring opinion in *Carbone*, in which she concluded that a flow control ordinance essentially identical to the ones challenged here was unconstitutional under *Pike* because "[e]ven a nondiscriminatory regulation may * * * impose an excessive burden on interstate trade when considered in relation to the local benefits conferred." 511 U.S. at 405 (O'Connor, J., concurring in the judgment). That was so even though the ordinance at issue did "*not* give more favorable treatment to local interests as a group as compared to out-of-state or out-of-town economic interests," instead pro-

viding that "in-town processors * * * and out-of-town processors [were] treated equally." *Id.* at 404 (emphasis added).[7]

The Fifth Circuit's contrary conclusion is logically insupportable. The court of appeals held that *Pike* balancing comes into play only when a state law has a differential impact on interstate commerce. But when a state law has the "practical effect of * * * discriminating" against interstate commerce, it is subject, *not* to the *Pike* test, but to the rule of virtual per se invalidity that governs discriminatory state regulations. *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 350-351 (1977). See, *e.g.*, *American Trucking Ass'ns, Inc.* v. *Scheiner*, 483 U.S. 266, 281 (1987) (state tax that has a discriminatory effect will be struck down even if does "not allocate tax burdens between insiders and outsiders in a manner that is facially discriminatory"). The Fifth Circuit's holding thus would render the *Pike* test a nullity by making it applicable only in a category of cases for which it is wholly unnecessary.

B. The Fifth Circuit's Decision Conflicts With The Holdings Of Other Courts Of Appeals

Given this background, it is no surprise that the Fifth Circuit's approach is in the minority among the courts of appeals. That court is aligned with the Second Circuit, which agrees that *Pike* requires a showing

> that a statute enacted for a legitimate public purpose, although apparently evenhanded, actually imposes "burdens on interstate commerce that exceed the burdens on intrastate commerce," * * * and that *those excess burdens* on interstate commerce are "clearly excessive in relation to the putative local benefits * * *." "The statute, at a minimum, must impose a burden on interstate commerce

[7] The majority in *Carbone* found it unnecessary to reach the application of *Pike*. See 511 U.S. at 390.

> that is *qualitatively or quantitatively different from that imposed on intrastate commerce*." * * * Under the *Pike* test, "if no such unequal burden be shown, a reviewing court need not proceed further."

Freedom Holdings Inc. v. Spitzer, 357 F.3d 205, 217-218 (2d Cir. 2004) (citations omitted) (emphasis added). In the Second and Fifth Circuits, "[t]he bottom line is therefore that, under either the 'clear discrimination' or the '*Pike*' forms of analysis, 'the minimum showing required ... is that [the state statute] have a disparate impact on interstate commerce.'" *Id.* at 218 (citation omitted; ellipses and bracketed material added by the court). *Freedom Holdings* applied this understanding to reject a constitutional attack under *Pike* because the challenged laws "ha[d] no such disparate impact" and did not favor "any in-state commercial interest." *Ibid.*[8]

At least four other circuits, however, have taken a very different approach, applying *Pike* to invalidate evenhanded state laws whose burdens on interstate commerce greatly exceed their local benefits – even when those laws do *not* have a disparate impact on interstate commerce. In *U & I Sanitation* v. *City of Columbus*, 205 F.3d 1063 (8th Cir. 2000), for example, the Eighth Circuit addressed a municipal flow con-

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[8] See also *Automated Salvage Transp.*, 155 F.3d at 75 (relied upon by the Fifth Circuit at App., *infra*, 18); *Gary D. Peake Excavating, Inc.* v. *Town Board of the Town of Hancock*, 93 F.3d 68, 76 (2d Cir.) (challenged ordinance satisfies *Pike* test because it "applies equally to all waste, regardless of its point of origin. Therefore, the ordinance does not impose burdens on interstate commerce that exceed the burdens imposed on intrastate commerce."). The Seventh Circuit appears to apply a similar test. See *Nat'l Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1132 (7th Cir. 1995) ("[u]nless the law discriminates against interstate commerce expressly or in practical effect, there is no reason to require special justification").

trol ordinance, very much like the ones at issue here, that did "*not* overtly discriminate against interstate commerce on its face, in its purpose, or through its effects." *Id.* at 1069 (emphasis added).[9] Under the Fifth Circuit's rule, that would have been the end of the analysis and the ordinance would have been upheld. But the Eighth Circuit invalidated the challenged ordinance because "the local interests that it serves do not justify the burden that it imposes upon interstate commerce." *Ibid.* Engaging in the balance mandated by *Pike*, the court found that the ordinance did little to advance local interests and that the municipality had alternative means to accomplish its purposes that would impose less of a burden on interstate commerce. *Id.* at 1069-1072. Particularly given the possibility that other localities might adopt similar flow control restrictions, the court explained that "the ordinance's interference with interstate commerce is 'clearly excessive' in relation to [its] local benefits." *Id.* at 1072. See also *R & M Oil & Supply, Inc.* v. *Saunders*, 307 F.3d 731, 735, 736 (8th Cir. 2002) (invalidating challenged law under *Pike*, despite absence of evidence that the law had a "discriminatory effect" or "places out-of-state distributors at a competitive disadvantage," because "there is clearly a burden [on interstate commerce] substantial enough to outweigh the *de mininis* putative local benefit of the law").

The Fourth, Sixth, and Tenth Circuits have used a similar analysis – and rejected the approach taken by the Fifth Circuit – in striking down (or reversing district court judgments upholding) state laws even though those laws did not have a disparate impact on interstate commerce. See *PSINet, Inc. v.*

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[9] Indeed the Columbus ordinance at issue in *U & I Sanitation* did not reach "garbage destined for out-of-state disposal." 205 F.3d at 1065. See *id.* at 1068-1069. Its effects therefore were effectively identical to the limits on the intrastate movement of waste addressed by the Fifth Circuit in its *Pike* analysis in this case.

Chapman, 362 F.3d 227, 240 (4th Cir. 2004) (even if challenged regulation of Internet were construed to reach only in-state web sites or sites having substantial contact with the regulating state, regulation is invalid under *Pike* "because the burdens it imposes on interstate commerce are excessive in relation to the local benefits it confers") (alternative holding);[10] *McNeilus Truck & Mfg., Inc. v. Ohio*, 226 F.3d 429, 444 (6th Cir. 2000) (even if statute is thought to be nondiscriminatory, "the lack of any significant local benefit that does not already exist means that the State * * * could not demonstrate that the benefits of the statute outweigh even an incidental burden on interstate commerce posed by the [challenged law]") (alternative holding); *Blue Circle Cement, Inc.* v. *Board of County Comm'rs*, 27 F.3d 1499, 1511-1512 (10th Cir. 1994) (agreeing with district court that challenged ordinance "regulates evenhandedly" and "confers no advantages on in-state entities," but reversing and remanding because lower court failed to apply *Pike* test); *A.C.L.U. v. Johnson*, 194 F.3d 1149, 1161 (10th Cir. 1999) (challenged law fails *Pike* balancing test) (alternative holding).

These conflicting standards often will determine the outcome of litigation: application of the Fifth Circuit's rule would have required the courts in each of the cases just discussed to reject the Commerce Clause challenges. Conversely, application in this case of the approach taken by the Eighth Circuit (as well as the Fourth, Sixth, and Tenth) would have resulted in invalidation of the challenged ordinances. This Court accordingly should grant review to resolve this conflict on a recurring and significant issue of constitutional law.

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[10] See also *Chambers Med. Techs of S.C., Inc.* v. *Bryant*, 52 F.3d 1252, 1261-1262 (4th Cir. 1995) (applying *Pike* test where challenged law "regulates evenhandedly and has only incidental effects on interstate commerce").

C. The Challenged Ordinances Should Have Been Invalidated Under *Pike*

Because it insisted on a showing of a discriminatory impact on interstate commerce, the Fifth Circuit failed to apply elements of the *Pike* test that, under a proper analysis, would have led to invalidation of the challenged ordinances. As Justice O'Connor explained in *Carbone*, under *Pike*

> "the practical effect of [the challenged ordinance] must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of the other States and what effect would arise if not one, but many or every, [jurisdiction] adopted similar legislation."

511 U.S. at 406 (O'Connor, J., concurring in the judgment) (citation omitted; bracketed material added by the Court). Here, had the court of appeals engaged in this inquiry, it would have had to conclude that, if "localities in [other] States impose the type of restriction on the movement of waste that [the Authority] has adopted, the free movement of solid waste in the stream of commerce will be severely impaired. Indeed, pervasive flow control would result in the type of balkanization the Clause is primarily intended to prevent." *Id.* at 406. See *U & I Sanitation*, 205 F.3d at 1071-1072 (court must not look only at "the particular ordinance at issue and its effects upon the particular parties before us," but must assume "that all cities * * * enacted flow control ordinances like the one at issue").[11]

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[11] In light of its holding regarding petitioners' standing, the Fifth Circuit indicated that, in applying *Pike*, it would "ignore the fact that the ordinances would not permit [petitioners] to ship waste generated within the Region out of state." App., *infra*, 17a. For the reasons explained above in our discussion of standing, this aspect

In addition, as Justice O'Connor also noted in *Carbone*, analysis under *Pike* must consider whether the local purpose "can be achieved by other means that would have a less dramatic impact on the flow of goods." 511 U.S. at 405 (O'Connor, J., concurring in the judgment). Here, as in *Carbone*, the sole local interest is "to ensure the financial viability of the [waste disposal] facilit[ies]." *Ibid.* And as the district court expressly found (App., *infra*, 29a, 32a), in this case, as in *Carbone*, the local governments have alternative means to achieve this goal that do not impose any burden on interstate commerce. See 511 U.S. at 405-406 (O'Connor, J., concurring in the judgment); *U & I Sanitation*, 205 F.3d at 1070-1071. Under the balancing test mandated by *Pike*, the court of appeals accordingly erred in upholding the challenged ordinances.

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit should be granted.

Respectfully submitted.

JOHN G. CORLEW
VIRGINIA T. MUNFORD
Watkins & Eager PLLC
Post Office Box 650
Jackson, MS 39205
(601) 948-6470

CHARLES A. ROTHFELD
Counsel of Record
EVAN M. TAGER
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

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of the court of appeals' analysis was wrong. But this mistake was independent of the court's more fundamental error in holding that the *Pike* balancing test applies only when the challenged law has a disparate impact on interstate commerce.

JOHN VAN GESSEL
Group General Counsel
Waste Management
2859 Paces Ferry Road
Suite 1600
Atlanta, GA 30339
(770) 805-3350

APRIL 2005

APPENDIX A

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

NATIONAL SOLID WASTE MANAGEMENT ASSOCIATION; ET AL., PLAINTIFFS,

NATIONAL SOLID WASTE MANAGEMENT ASSOCIATION; BFI WASTE SYSTEMS, BFI WASTE SYSTEMS OF MISSISSIPPI LLC; WASTE MANAGEMENT OF MISSISSIPPI INC., PLAINTIFFS-APPELLEES,

v.

PINE BELT REGIONAL SOLID WASTE MANAGEMENT AUTHORITY AND ITS BOARD OF COMMISSIONERS; COVINGTON COUNTY; JONES COUNTY; PERRY COUNTY; CITY OF PETAL; CITY OF LAUREL; CITY OF HATTIESBURG, MISSISSIPPI; DEFENDANTS-APPELLANTS,

MIKE MOORE, INTERVENOR-DEFENDANT-APPELLANT.

NO. 03-60470.

OCT. 29, 2004.

Before GARWOOD, WIENER and DeMOSS, Circuit Judges.

GARWOOD, Circuit Judge:

The Mississippi cities and counties that belong to the Pine Belt Regional Solid Waste Management Authority (the Authority) enacted solid waste flow control ordinances requiring that all solid waste collected within those cities and counties be disposed of at facilities owned by the Authority. Plaintiffs-appellees, National Solid Wastes Management Association (NSWMA), BFI Waste Systems of Mississippi, LLC (BFI), and Waste Management of Mississippi, Inc. (Waste Management) (collectively, plaintiffs), filed this suit

against defendants-appellants, the Authority and its member cities and counties, claiming that the flow control ordinances violated the dormant Commerce Clause. Defendants-appellants now timely appeal the judgment, rendered after a bench trial, declaring the flow control ordinance invalid under the dormant Commerce Clause and enjoining their enforcement. We dismiss plaintiffs' complaint in part for want of standing and with respect to the remainder we reverse and render judgment for defendants-appellants.

Facts and Proceedings Below

In 1989 and 1990, several cities and counties in South Mississippi developed a master plan for the management of the solid waste in the region. The goal of the plan was to develop an environmentally-sensitive and cost-effective program for the disposal of the region's solid waste. Among other things, the master plan recommended the creation of a regional solid waste management authority and the construction of a regional landfill. In 1992, the Authority was formed and the plan was adopted. At that time, the Authority was made up of five counties (Covington, Jones, Perry, Forrest, and Lamar) and three cities (Petal, Laurel, and Hattiesburg) in Mississippi (collectively, the Members). By the time this suit was filed, Forrest and Lamar Counties had withdrawn from the Authority.

In 1992, the Authority issued a request for proposals (RFP) to interested parties, including plaintiffs BFI and Waste Management, regarding the regional landfill. Proposals were to be given for two options: 1) to own, design, permit, build, and operate the landfill for thirty years or 2) to equip and operate the landfill for seven years, with the Authority building and owning the landfill. The RFP included an estimated volume of disposable solid waste that would be

generated in the geographic area comprised by the Members[1] and a statement that "[u]pon request, the Authority will require each [Member] ... to adopt and enforce a flow control ordinance in order to assure that the entirety of the ... waste stream generated within the [geographic area comprised by the Members] will be managed and disposed of at the [Authority's landfill]." Five proposals were received, including from BFI and Waste Management. Enviro, a company headquartered in Laurel, Mississippi, submitted the lowest bid for Option 2, but did not submit a bid for Option 1. The Authority analyzed the bids, decided to own the landfill, and began implementation discussions with Enviro prior to actual contract negotiations.

In 1996, the Authority issued revenue bonds to finance the construction of the landfill and three transfer stations.[2] Also in 1996, Enviro signed a contract with the Authority to

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[1] The 1992 RFP estimated the annual volume of disposable waste in the Region to be 153,000 tons. That estimate, however, was derived before Forrest and Lamar Counties withdrew from the Authority. After these two counties withdrew (which was prior to July 2002), the projected volume of waste for the Authority's Region would have been about 129,000-130,000 tons per year.

When creating the master plan and issuing the RFP, the Authority contemplated, at least implicitly, that all solid waste generated within the Region would be disposed of at the landfill that was the subject of the RFP. The Authority's landfill is, and always has been, the only "Subtitle D" landfill within the Region. A Subtitle D landfill is one that is compliant with federal regulations, issued pursuant to Subtitle D of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. § 6941, *et. seq.*, setting the criteria for sanitary landfills.

[2] Waste collecting trucks often unload waste locally at a transfer station until the waste is transported to a landfill for final disposal.

operate the Authority's landfill,[3] located in Perry County and completed in 1997, and transfer stations. The initial term of the contract was for the life of the first landfill cell or seven years, whichever was less, and was to be automatically extended for one-year terms so long as both parties mutually agreed. In 2000, the Authority refinanced the 1996 bonds and issued additional bonds to finance the construction of a second cell at the landfill.

The Authority generates revenue by collecting fees for the disposal of waste at its landfill and transfer stations. Thus the Authority's generation of revenue is based on the amount of garbage that it receives at its facilities. To the extent that the Authority is unable to generate sufficient income to meet its debt payments, the Members are obligated to make up the shortfall.

From the time the landfill opened, the volume of refuse that passed through and to the Authority's facilities was significantly less than the total amount of potential waste generated in the area comprised by its Members. Although the Authority's issuance of bonds was based on a projected volume of 140,000 tons per year, in fiscal year 1998 the landfill's volume had reached only 105,305 tons and in fiscal year 1999, the volume dropped to 96,032 tons. In 1999, in an attempt to increase its trash collection, and therefore its revenue generation, the Authority extended the service area of the landfill to include a total of 22 counties, which allowed the Authority to receive waste at its landfill from the additional counties which were not Members.[4] While the volume

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[3] Enviro provides the labor, management, supplies, equipment, and insurance for the landfill and operates the scales and performs all maintenance at the landfill.

[4] According to its contract with the Authority, Enviro was obligated to bring to the Authority's landfill all the waste it collected within a 75-mile radius of the landfill. The area comprised by the 22 counties roughly corresponds to this 75-mile radius. *The flow*

of trash deposited at the landfill increased with the expanded service area, it reached a high of only 129,017 tons in fiscal year 2000, with the tonnage decreasing thereafter (to 108,625 in 2001 and to 95,205 in 2002).

Due to an insufficient flow of rubbish through and to its facilities, the Authority realized that, at the current volume of waste, it would not be able to make its July 1, 2004 bond payment. Believing that its facilities needed more garbage to remain viable, the Authority adopted a resolution on July 10, 2002, directing its Members to adopt flow control ordinances requiring that all municipal solid waste generated within the then Member counties (Covington, Jones and Perry) and cities (Petral [*sic*], Laurel and Hattiesburg) respectively [collectively, the Region] be transported to its landfill or one of its transfer stations.[5] Each Member enacted identical ordinances, each applicable only within the geographic area of the particular enacting Member, with September 1, 2002, as the effective date.[6] Each ordinance provided that noncompliance therewith would constitute a misdemeanor.

Following the enactment of the ordinances, plaintiffs on August 29, 2002 filed this suit against the Authority and its

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control ordinances, however, apply *only* to the three counties and three cities that are Members of the Authority. When the Authority first created its plan for the landfill, the service area included only the five original member counties (Covington, Jones, Perry, Forrest, and Lamar); the expanded service area added an additional 17 counties.

[5] According to testimony at trial, the amount of trash currently leaving the Region is between 50,000 to 70,0000 tons per year; if this trash were directed to the Authority's landfill, the tonnage disposed of at the landfill would likely be over 140,000, roughly the amount needed to meet the Authority's debt obligations.

[6] The flow control ordinances were subsequently reenacted in September, October, and November of 2002.

Members, seeking declaratory, injunctive, and monetary relief under 42 U.S.C. § 1983.[7] Plaintiffs BFI and Waste Management collect, process, and dispose of commercial and residential solid waste and currently ship the trash they collect within the Region to landfills and transfer stations that they either own and operate or that are owned and operated by affiliated companies. At the time of the suit, solid waste collected by BFI and Waste Management within the Region was and had been eventually transported to landfills outside of the Region, but within Mississippi; none of such waste was (or had been) transported outside of Mississippi (nor did any of it originate as waste outside of Mississippi).[8] The flow control ordinances would require that BFI and Waste Management dispose of waste they collect within the Region only at the Authority's landfill in Perry County.

After the filing of the complaint, the parties agreed that the enforcement of the ordinances would await the outcome of the case. In October 2002, the Mississippi State Attorney General intervened on behalf of Mississippi to defend a potential constitutional challenge to the Mississippi statute pursuant to which the Authority was authorized to direct its Members to enact the flow control ordinances. *See* Miss.Code. Ann. § 17-17-319(2).

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[7] Pine Belt Waste Systems, LLC, also joined with plaintiffs in bringing this suit. Pine Belt Waste, however, was voluntarily dismissed as a plaintiff on November 25, 2002, prior to trial.

[8] Although the Authority's landfill is the only Subtitle D landfill within the Region, *see supra* note 1, the landfills to which BFI and Waste Management currently haul garbage generated within the Region are Subtitle D landfills. BFI currently hauls waste collected within the Region to its landfill in Madison County, Mississippi, and Waste Management hauls its waste to a landfill owned and operated by an affiliated company in Scott County, Mississippi.

Trial was held in December 2002 before the district judge without a jury. After the trial, but before a decision was rendered, Perry County filed a motion to dismiss for lack of jurisdiction based on the "adequate state grounds" doctrine. Also following the trial, the district judge recused himself on his own motion, and the matter was subsequently properly assigned, with consent of the parties, to a magistrate judge for decision. On April 23, 2003, the magistrate judge denied the motion to dismiss and issued findings of fact and conclusions of law and an accompanying judgment, deciding that the ordinances were unconstitutional under the dormant Commerce Clause and enjoining their enforcement.[9] Defendant on May 22, 2003, timely filed their notice of appeal.

Discussion

Defendants contend that the flow control ordinances do not violate the dormant Commerce Clause.[10] We dismiss the

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[9] No damages were awarded. While the judgment purports to generally award "attorneys fees," no amount thereof is stated in the judgment (or in the findings and conclusions) and we are informed by the parties that plaintiffs have in substance waived attorneys fees under this judgment by failing to file any evidence of the amount of attorneys fees or any motion in connection therewith as contmplated in Fed.R.Civ.P. 54(d)(92) and the local rules.

[10] Defendants also contend that the district court lacked jurisdiction because plaintiffs did not appeal the Member counties' and cities' adoption of the ordinances to a state circuit court as authorized by Miss.Code Ann. 11-51-75. *See Benedict v. City of Hattiesburg,* 693 So.2d 377, 380 (Miss.1997); *Falco Lime Inc. v. Mayor & Aldermen of City of Vicksburg,* 836 So.2d 711, 716 (Mis.2002). We reject that contention. The instant suit is one under 42 U.S.C. § 1983 seeking declaratory and injunctive relief against local government ordinances adopted under color of state law on the ground that the ordinances are invalid under and contrary to the United States Constitution. *See Dennis v. Higgins,* 498 U.S.439, 111 S.Ct. 865, 112 L.Ed.2d 969 (1991); *National PrivateTruck Council v. Oklahoma Tax Comm'n,* 515 U.S. 582, 115

dormant Commerce Clause claim in part for lack of standing and reverse with respect to the remainder of the claim.

A. Standard of Review

Review of questions of constitutional law is *de novo*. *United States v. Hemmingson,* 157 F.3d 347, 355 (5th Cir.1998). The magistrate judge's findings of fact, however, are reviewed for clear error. *City of New Orleans v. Mun. Admin. Servs., Inc.,* 376 F.3d 501, 506 (5th Cir.2004).

B. Dormant Commerce Clause Analysis

Although the Commerce Clause is an affirmative grant of power to Congress, U.S. CONST. art I, § 8, cl. 3, the Supreme Court has interpreted the clause to contain a negative aspect, the so-called "dormant" Commerce Clause. *Dickerson v. Bailey,* 336 F.3d 388, 395 (5th Cir.2003). The dormant Commerce Clause "'prohibits economic protectionism--that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" *Id.* (quoting *Wyoming v. Oklahoma,* 502 U.S. 437, 112 S.Ct. 789, 800, 117 L.Ed.2d 1 (1992)).

We begin our dormant Commerce Clause analysis by asking whether the ordinances "(1) facially discriminate against out-of-state economic interests, or (2) regulate even-handedly and thereby evince only an indirect burden on interstate commerce." *Dickerson,* 336 F.3d at 396. In other words, we ask whether the ordinances "reflect[] a discriminatory purpose or merely a discriminatory effect." *Id.* "Although ... there is no clear line of separation between these

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S.Ct. 2351, 2353-54, 132 L.Ed.2d 509 (1995). "When federal claims are premised on 42 U.S.C. § 1983 ... we have not required exhaustion of state judicial or administrative remedies." *Steffel v. Thompson,* 415 U.S. 452, 94 S.Ct. 1209, 1222, 39 L.Ed.2d 505 (1974). *See also Self-Ins. Inst. of America, Inc. v. Korioth,* 993 F.2d 479, 482 (5th Cir.1993).

two" classifications, "the threshold determination is significant if only because it establishes the constitutional standard of review." *Id.* (internal quotations and citations omitted).

Regarding the first category, "[s]tate laws discriminating against interstate commerce on their face are virtually *per se* invalid." *Id.* (internal quotations and citations omitted). The ordinance will be unconstitutional unless the state actor "can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *Id.* (internal quotations and citations omitted). "At a minimum such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." *Hughes v. Oklahoma,* 441 U.S. 322, 99 S.Ct. 1727, 1737, 60 L.Ed.2d 250 (1979). "Under this strict scrutiny, ... the state bears the heavy burden to rescue its statutes." *Dickerson,* 336 F.3d at 396 (internal quotations and citations omitted). "This burden is stringent" and the statute at issue is "generally struck down ... without further inquiry." *Id.* (internal quotations and citations omitted).

With the second category–the "evenhanded statutes" that effectuate a legitimate local interest and that only incidentally affect interstate commerce–we apply the "*Pike* balancing test." The statute will be upheld unless the burden it imposes on interstate commerce is "'clearly excessive in relation to the putative local benefits.'" *Id.* (quoting *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970)).

The magistrate judge struck down the flow control ordinances, finding them to be to be facially discriminatory against interstate commerce. The magistrate judge also determined that the ordinances would not pass the *Pike* test, assuming *arguendo,* as defendants argued, that the ordinances were not facially discriminatory.

C. Plaintiffs' Standing

Before we consider the merits, we must first determine whether plaintiffs BFI and Waste Management have standing to challenge the flow control ordinances.[11] Although defendants have not explicitly raised the issue of standing, we may consider it *sua sponte*. *Bauer v. Texas*, 341 F.3d 352, 357 (5th Cir. 2003). Our standing analysis consists of constitutional and prudential components.

1. Constitutional Standing

"To meet the constitutional standing requirement, a plaintiff must show (1) an injury in fact (2) that is fairly traceable to the actions of the defendant and (3) that likely will be redressed by a favorable decision." *Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 560 (5th Cir.2001) (citing *Bennett v. Spear*, 520 U.S. 154, 117 S.Ct. 1154, 1161, 137 L.Ed.2d 281 (1997); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992)).

Plaintiffs meet the constitutional, or *Article III*, standing requirements. Because of the flow control ordinances, plaintiffs will not be able to ship the garbage they collect within the Region to the landfills of their choice and, as a result, will be forced to pay a "tipping"[12] fee at the Authority's landfill.

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[11] As a not-for-profit trade association that represents the interests of the private waste services industry and of which BFI and Waste Management are members, plaintiff NSWMA's standing is on this record *entirely* dependent upon whether BFI and Waste Management having standing. *See Public Citizen, Inc. v. Bomer*, 274 F.3d 212, 219 n. 5 (5th Cir.2001) (stating that "organizational standing requires, ... that individuals have standing to sue in their own right"). NSWMA took absolutely no active role in this litigation and has not submitted anything to establish its standing independent of that of BFI and Waste Management.

[12] In garbage parlance, "tipping" is used in place of the less-refined "dumping."

Testimony at trial indicates that plaintiffs' cost to dispose of waste at the Authority's landfill, including the tipping fee and the transportation cost, would be higher than their current cost.[13] Thus, plaintiffs have an injury (higher operating costs) that is traceable to the ordinances enacted by defendants and which would be remedied if we rule that the ordinances are unconstitutional.

2. Prudential Standing

The more difficult question is whether plaintiffs meet the prudential standing requirements. The goal of the prudential standing requirements is to "determine whether the plaintiff 'is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers.'" *Procter & Gamble,* 242 F.3d at 560 (quoting *Bender v. Williamsport Area Sch. Dist.,* 475 U.S. 534, 106 S.Ct. 1326, 1334 n. 8, 89 L.Ed.2d 501 (1986)).

> "These judicially created limits concern whether a plaintiff's grievance arguably falls within the zone of interests protected by the statutory provision invoked in the suit, whether the complaint raises abstract questions or a generalized grievance more

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[13] In addition to a simple comparison of current costs against the costs under the flow control ordinances, other testimony supports plaintiffs' claim of higher costs. The ordinances preclude plaintiffs from operating an "internalized" business--meaning that they collect, transport, and dispose of the waste using their own facilities. Testimony at trial suggests that such a method of operation achieves the best economy of scale for a waste collector. Further, BFI and Waste Management would face a reduced volume of waste at the transfer stations to which they currently haul waste from the Region, because they most likely cannot economically segregate at the transfer station the waste that comes from within the Region from that which comes from outside the Region. The result of the reduced volume at the transfer stations would be an increased operating cost per ton.

> properly addressed by the legislative branch, and whether the plaintiff is asserting his or her own legal rights and interests rather than the legal rights and interests of third parties." *Procter & Gamble,* 242 F.3d at 560.

The key inquiry for prudential standing in this case is whether the injury of which plaintiffs complain is "arguably within the zone of interests to be protected" by the dormant Commerce Clause, the "constitutional guarantee in question" here. *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp,* 397 U.S. 150, 90 S.Ct. 827, 830, 25 L.Ed.2d 184 (1970). *See also Boston Stock Exch. v. State Tax Comm'n,* 429 U.S. 318, 97 S.Ct. 599, 603 n. 3, 50 L.Ed.2d 514 (1977) (applying the zone of interests test in the context of the dormant Commerce Clause). The facts of this case require that we analyze the zone of interest question in two parts: We must determine whether plaintiffs have standing to challenge the flow control ordinances as being facially discriminatory against out-of-state economic interests or whether they can merely challenge the ordinances as being excessively burdensome to interstate commerce.

a. Facially Discriminatory

The two-staged analysis for dormant Commerce Clause claims is instructive as to the relevant zone of interests to be protected. First, with respect to laws that facially discriminate against out-of-state economic interests, the dormant Commerce Clauses [*sic*] seeks to protect against local economic protectionism and retaliation among the states. *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.,* 511 U.S. 383, 114 S.Ct. 1677, 1682, 128 L.Ed.2d 399 (1994) ("The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent."). In this context, discrimination "simply means

differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of the State of Or.*, 511 U.S. 93, 114 S.Ct. 1345, 1350, 128 L.Ed.2d 13 (1994).

We conclude that plaintiffs' injury does not fall within the zone of interests to be protected by the dormant Commerce Clause with respect to ordinances that are alleged to facially discriminate against out-of-state economic interests. The flow control ordinances mandate that any waste generated within the Region be transported to the Authority's landfill or transfer stations. In effect, the ordinances prohibit the export of any waste outside of the Region, including out of state. However, *these* plaintiffs do not ship (and, so far as the record shows, have never shipped) *any* waste they collect within the Region to any location outside of Mississippi, nor do they ship (and, so far as the record shows, have never shipped) any waste from outside of Mississippi to the Region. Plaintiffs also have not even alleged that they have any plans to do so,[14] and have not suggested that some other party currently ships waste from the Region outside of Mississippi or has plans to do so, or that any out-of-state waste processor receives (or has plans to receive) any of the Region's waste out of state. In sum, plaintiffs' injury is not re-

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[14] Stone County, a Mississippi county that is now within the Authority's expanded service area, *see supra* note 4, has voted to join the Authority, and the Authority has agreed in principle; however, the required ultimate contract between the two had not been finalized by the time of the trial. Waste collected in Stone County by BFI is currently shipped to a landfill in Alabama. As Stone County has not enacted any flow control ordinance and is not a party to this suit (and as none of the here challenged ordinances is applicable to waste collected in Stone County), we will not consider the fact that waste from Stone County is actually shipped out of state.

lated to any out-of-state characteristic of their business.[15] Thus, plaintiffs do not have standing to challenge the ordinances on the basis of a claim that they are facially discriminatory against out-of-state interests.[16] As such, we express

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[15] We also observe that both BFI and Waste Management have their principal place of business in Mississippi. Nothing in the flow control ordinances turns on the principal place of business or the place of incorporation or the citizenship of any generator, disposer or handler of waste (or otherwise).

[16] We note that our conclusion that plaintiffs do not meet the prudential standing requirement differs from that in two opinions from our sister circuits. *See On the Green Apartments LLC v. City of Tacoma,* 241 F.3d 1235 (9th Cir.2001); *Houlton Citizens' Coalition v. Town of Houlton,* 175 F.3d 178 (1st Cir.1999). In *On the Green* and *Houlton,* the plaintiffs did not allege that they disposed of their waste out of state or that they had plans to do so. *On the Green,* 241 F.3d at 1241-40; *Houlton,* 175 F.3d at 183. Nevertheless, both the Ninth Circuit and the First Circuit concluded that the plaintiffs met the prudential standing requirements.

We disagree with the analysis in this aspect of *On the Green* and *Houlton.* In *On the Green,* the Ninth Circuit concluded that because the plaintiff alleged only an *intrastate* burden, the "Commerce Clause [was] not at all implicated." *On the Green,* 241 F.3d at 1242. We fail to see how the plaintiff's alleged injury could even arguably fall within the zone of interests to be protected by the dormant Commerce Clause when the court concluded that the case *did not even implicate the Commerce Clause. See id.* at 1242 (Reavley, J., dissenting). Further, the Ninth Circuit seems to have confused the redressability requirement for constitutional standing with the zone of interests test. The Ninth Circuit concluded that the plaintiff's injury was "related to the purposes underlying the Commerce Clause" because the "injury would be *remedied* if [the plaintiff] could take its garbage outside the city." *Id.* at 1241 (emphasis added). The fact that an injury would be remedied if the ordinance was struck down does not mean that the grievance falls within the zone of interests to be protected by the dormant Commerce Clause, particularly when there was no allegation of *any*

no opinion about whether the ordinances would pass the facially discriminatory test if challenged by a proper plaintiff.

b. Burdens Interstate Commerce

We next consider whether plaintiffs nonetheless have standing to challenge the flow control ordinances on the basis of the claim that they excessively burden interstate commerce. We conclude that plaintiffs do meet the zone of interests test in this regard and thus have standing to challenge the ordinances as to their burden on interstate commerce.

The protected against injury is an excessive burden on interstate commerce. An allegation that the plaintiff is involved in interstate commerce and that the *plaintiff's* interstate commerce is burdened by the ordinance in question is sufficient to satisfy the zone of interests test with respect to ordinances that assertedly impose an excessive burden on interstate commerce.

Even though plaintiffs do not ship any garbage collected in the Region out of state, they are engaged in interstate commerce, and *their* interstate commerce is allegedly burdened by the ordinances. A representative of BFI testified at trial that BFI had some contracts that are negotiated on a national

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interstate burden. Under the Ninth Circuit's rationale in *On the Green,* the zone of interest test and the redressability requirement would essentially be the same.

In *Houlton,* the First Circuit concluded that the plaintiff met the zone of interests requirement because the plaintiff had "assert[ed] his own economic interests under the Commerce Clause – a constitutional provision specifically targeted to pro[t]ect those interests." *Houlton,* 175 F.3d at 183. However, the rationale behind the dormant Commerce Clause is to protect against *local economic protectionism at the expense of out-of-state interests, Carbone,* 114 S.Ct. at 1682, not to protect *any economic* interests. In our opinion, the *Houlton* court simply viewed too broadly the zone of interests protected by the dormant Commerce Clause.

or an interstate basis and that such contracts were common. The BFI representative testified that an effect on the Mississippi portion of such a contract would ripple to the portion of the contract in other states.[17] Plaintiffs argue that, because the flow control ordinances will raise their costs to service these national and regional contracts which include customer locations within the Region, they will be relatively less competitive within the Region and that this impact on these contracts will extend to the portion of the contracts covering customer locations outside of Mississippi. The ordinances thus allegedly burden plaintiffs' interstate commerce. Plaintiffs therefore are arguably within the appropriate zone of interests and, therefore, have standing to challenge whether the ordinances excessively burden interstate commerce.[18]

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[17] It is not claimed that anything in the contracts requires that any waste collected within the Region be disposed of outside of the Region. Nor do the ordinances make any requirement that any waste collected outside the Region (though under a contract also covering waste collected within the Region) be disposed of within the Region.

[18] A Waste Management representative gave testimony similar to that given by the BFI representative. He testified that the parent company, Waste Management, Inc., operated in 48 states and that because of the interrelated nature of the business, savings achieved on a transaction in one state would eventually be shared in another stated. Although the representative did not testify that increased *costs* in one area would be similarly shared, we assume arguendo that they would be.

In any event, when one of multiple co-parties raising the same claims and issues properly has standing, we do not need to verify the independent standing of the other co-plaintiffs. *See Clinton v. City of New York,* 524 U.S. 417, 118 S.Ct. 2091, 2100 n. 19, 141 L.Ed.2d 393 (1998); *Bowsher v. Synar,* 478 U.S. 714, 106 S.Ct. 3181, 3185, 92 L.Ed.2d 583 (1986). Therefore, because we find that BFI has standing to challenge whether the flow control ordi-

D. Pike Balancing Test

We now turn to the *Pike* balancing test to determine whether the flow control ordinances excessively burden interstate commerce.[19] For this analysis, because plaintiffs do not have standing to challenge the ordinances as facially discriminatory against out-of-state interests, we ignore the fact that the ordinances would not permit them to ship waste generated within the Region out of state.

An "evenhanded" ordinance, *i.e.,* one that does not facially discriminate against out-of-state interests and only incidentally affects interstate commerce, will be upheld unless the burden it imposes on interstate commerce is "clearly excessive in relation to the putative local benefits" of the ordinance. *Pike,* 90 S.Ct. at 847. To make this assessment, we consider the nature of the local interest and whether alternative means could achieve that interest with less impact on interstate commerce:

> "If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Id.*

We first look for a legitimate public purpose that defendants intended to advance by implementing flow control. Defendants indeed have a legitimate local purpose: to ensure the economic viability of their landfill. *See U & I Sanitation*

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nances excessively burden interstate commerce, we need not further analyze Waste Management's independent standing.

[19] Because the magistrate judge alternatively held that the ordinances would not pass even the less rigorous *Pike* test, we need not remand the case for the court below to consider the *Pike* test in the first instance.

v. City of Columbus, 205 F.3d 1063, 1070 (8th Cir.2000) (recognizing economic viability as a legitimate local purpose in the context of a waste flow control ordinance).

Next, we identify the burden imposed on interstate commerce. To succeed in a challenge to a regulation under the *Pike* balancing test, the challenging party must show that the regulation has "a disparate impact on interstate commerce." *Automated Salvage Transp., Inc. v. Wheelabrator Envtl. Sys., Inc.,* 155 F.3d 59, 75 (2d Cir.1998). The "incidental burdens to which *Pike* refers are the burdens on interstate commerce that exceed the burdens on intrastate commerce." *Id.* (internal quotation and citation omitted). "Where a regulation does not have this disparate impact on interstate commerce, then we must conclude that ... [it] has not imposed any incidental burdens on interstate commerce" and, therefore, that it passes the *Pike* test. *Id.* (internal quotation and citation omitted).

The flow control ordinances here do not have a disparate impact on interstate commerce; consequently, plaintiffs fail in their attempt to show that the ordinances do not pass the *Pike* test. The only evidence of an interstate burden is the effect on plaintiffs' interstate contracts: the flow control ordinances, because they will raise plaintiffs' costs within the Region and will make plaintiffs relatively less competitive, impose a burden on plaintiffs' interstate commerce by affecting the portion of plaintiffs' interstate contracts that involve areas beyond Mississippi. The burdens imposed by the ordinances on interstate commerce, however, are no greater than those imposed on *intrastate* commerce. Plaintiffs' contracts that are wholly within Mississippi, and even wholly within the Region itself, will also be affected as plaintiffs' costs increase within the Region and plaintiffs, thereby, become relatively less competitive. In fact, the burden imposed on wholly intrastate contracts, particularly those that are contained wholly within the Region, will likely be *greater* than that imposed by the flow control ordinances on plaintiffs' interstate contracts. The interstate contracts–which are pre-

sumably larger than plaintiffs' contracts that are contained entirely within Mississippi or the Region–will likely be more able to spread the increased costs over a wider base of business than will plaintiffs' smaller contracts. We fail to see how the ordinances will in this respect impose a greater burden on interstate commerce than they will on *intrastate* commerce.

Moreover, so far as they affect BFI and Waste Management, the ordinances do not inhibit the flow of goods (or waste) interstate. *Int'l Truck & Engine Corp. v. Bray,* 372 F.3d 717, 727 (5th Cir.2004) ("A statute imposes a burden when it inhibits the flow of goods interstate."). Furthermore, while the ordinances may have the effect of shifting some business away from plaintiffs, as the ordinances increase their costs and make them relatively less competitive, this result does not mean that the ordinances burden interstate commerce: "[T]he dormant Commerce Clause 'protects the interstate market, not particular interstate firms.'" *Id.* (quoting *Exxon Corp. v. Governor of Md.,* 437 U.S. 117, 98 S.Ct. 2207, 2215, 57 L.Ed.2d 91 (1978)) (stating that the fact that a regulation might cause truck purchasers to turn to other competing truck manufacturers did not burden interstate commerce). If plaintiffs lose some of their interstate contracts because of their higher costs within the Region, the ordinances would not prohibit another garbage collector from entering into a similar interstate contract, whether that garbage collector was from Mississippi or some other state.

Because plaintiffs have not shown that the ordinances disparately impact interstate commerce relative to intrastate commerce, their *Pike* challenge that the ordinances excessively burden interstate commerce fails.

Conclusion

Accordingly, (a) we DISMISS for want of standing plaintiffs' claim with respect to whether the ordinances facially discriminate against interstate commerce or out-of-state interests, and (b) with respect to whether the ordinances otherwise excessively burden interstate commerce, we REVERSE and RENDER judgment for defendants.[20]

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[20] In his opinion the magistrate judge did not reach any conclusion regarding Mississippi Code § 17-17-319(2), the law pursuant to which the Authority directed its Members to enact flow control ordinances, the judgment does not speak to § 17-17-319(2) and the parties do not argue that this court need address its constitutionality. Moreover, as we hold that as to the particular flow control ordinances here the suit must be dismissed for want of standing with respect to whether the ordinances are facially discriminatory against interstate commerce contrary to the dormant Commerce Clause and that those ordinances do not violate the dormant Commerce Clause with respect to whether they otherwise excessively burden interstate commerce compared to their putative local benefits, we need not further address the constitutionality of § 17-17-319.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

NATIONAL SOLID WASTE MANAGEMENT ASSOC., et al., PLAINTIFFS

versus

PINE BELT SOLID WASTE MANAGEMENT AUTHORITY, et al., DEFENDANTS

CIVIL ACTION NO. 2:02CV723Gu

[April 23, 2003]

FINDINGS OF FACT AND CONCLUSIONS OF LAW PURSUANT TO FED. R. CIV. P. 52(A)

The question before this Court is whether certain municipal ordinances restricting the disposal of solid waste colleced within a specific geographic area constitutes a vidation of the Commere Clause of the United States Constituton. The plaintiffs, Waste Management of Mississippi, Inc ("Waste Management") and Browning Ferris Waste Systens of Mississippi, LLC ("BFI"), are in the business of collecion and disposal of solid waste. The, defendant, Pine Belt Soid Waste Management Authority ("Authority"), caused its menber governmental entities to enact solid waste flow control ordinances. Pursuant to these flow control ordinances, all solid waste collected within the Authority boundaries must be directed to the Authority landfill and transfer statiois. Plaintiffs filed this action contending that the flow control ordinances discriminate against interstate commence. Defendants counter that these flow control ordinances are vald regulations for the collection and disposal of solid waste. According to defendants, any effect upon interstate commerce is merely incidental and any burden upon interstae commerce is outweighed by the putative local benefits.

FACTS

The facts in this case are largely undisputed.[1] In an effort to address the public necessity for the safe and efficient collection and disposal of solid waste, Mississippi enacted the "Mississippi Regional Solid Waste Management Authority Act."[2] Among other things, the Act permits local governmental bodies to form regional waste management authorities. In 1992, the Pine Belt Regional Waste Management Authority was created. Its local governmental members included the Cities of Hattiesburg, Laurel and Petal, as well as the Counties of Covington, Jones, Perry, and Lamar.[3] The Authority generates revenue by collecting fees for solid waste transfer and disposal at its facilities. In 1996, the Authority issued revenue bonds to finance capital expenditures, land acquisition, construction and maintenance of a regional landfill and three transfer stations. In the event that the Authority was unable to generate sufficient income to meet its bonded indebtedness, the Authority members would be obligated to make up the shortfall. While it is stipulated that the Authority owns the landfill and transfer stations, these facilities are operated under contract by a private entity, to wit: Enviro Inc. ("Enviro"). The Authority expanded its service area in 1999 to include approximately 22 Mississippi counties. Although the membership of the Authority did not change, the expanded service area permits the Authority to increase its income stream by receiving additional solid waste from the municipalities within the expanded area. At this time, the Authority is in the process of completing a fourth transfer station.

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[1] Throughout these findings and conclusions, the critical testimony and exhibits will be discussed. However, all of the evidence has been considered.

[2] MISS. CODE ANN. § 17-17-301 through § 17-17-349.

[3] Lamar County later withdrew from the Authority.

Due primarily to a reduction in the amount of solid waste received at its facilities, the Authority realized that it would be unable to meet its financial obligations in fiscal year 2004. In an effort to increase the volume of solid waste received at its facilities and consequently increase revenue, the Authority decided to direct its members to initiate solid waste flow control ordinances. In July and August of 2002, each member of the Authority enacted identical flow control ordinances which require disposal of all solid waste generated within the geographic boundaries of the Authority at one of its facilities.[4] A violation of the flow control ordinance constitutes a misdemeanor offense punishable by fine and/or imprisonment.

The plaintiffs collect, process and dispose of commercial and residential solid waste throughout Mississippi. In addition, plaintiffs own and operate private landfills and transfer stations. Significantly, plaintiffs have numerous private contracts for the collection and disposal of commercial solid waste within the geographic boundaries of the Authority. As a result of the solid waste flow control ordinances enacted by the Authority members, plaintiffs will be prohibited from disposing of solid waste collected within the Authority boundary at their own facilities or any other public or private facility outside of the Authority. According to plaintiffs, the flow control ordinances will increase their operating costs, place in jeopardy private contracts with commercial solid waste producers, and result in an unfair economic advantage

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[4] The flow control ordinances were subsequently reenacted in September, October and November of 2002. They each provide in part that all "solid waste generated within the geographic boundaries ... that is placed in the waste stream shall be transported to, stored and managed at the Pine Belt Regional Solid Waste Management Authorities landfill in Perry County, Mississippi, or at a transfer station owned by the Pine Belt Regional Solid Waste Management Authority."

for their competitors. Consequently, plaintiffs filed a complaint seeking declaratory, injunctive and monetary relief under 42 U.S.C. § 1983. After the plaintiffs filed their complaint, the parties reached an agreement in which the municipalities would forego enforcement of the flow control ordinances, thus maintaining the status quo pending trial and disposition of this matter on the merits. The matter was tried without a jury. Subsequent to trial, the parties consented to trial and entry of a final judgment by a U.S. Magistrate Judge. The case has been referred pursuant to 28 U.S.C. § 636(c)(1) and by the agreement of the parties has been adjudicated upon the trial record, exhibits and stipulations.

DISCUSSION

The Authority has undertaken an arduous task. Disposal of ever increasing amounts of solid waste has created a national problem that has produced complex environmental, technical and political issues. The Court must determine whether the solid waste flow control ordinances enacted by the defendants affects interstate commerce and if so, whether these flow control ordinances constitute discrimination against interstate commerce or whether they regulate in an evenhanded manner with only incidental effects on interstate commerce which are outweighed by the putative local benefits.

The Dormant Commerce Clause

The United States Constitution provides that "[t]he Congress shall have Power ... [t]o regulate Commerce ... among the several States." U.S. CONST. art. I, § 8, cl. 3. Although the Commerce Clause is an affirmative grant to Congress, the Commerce Clause has been interpreted by the courts to contain a "negative" aspect. This doctrine, called the "negative" or "dormant" Commerce Clause, is a judicially created limit on a state's power to regulate interstate commerce in the absence of authority from the Congress. It denies the States the power to unjustifiably discriminate against or burden the in-

terstate flow of articles of commerce. *Ore. Waste Sys., Inc. v. Dep't of Envtl. Quality,* 511 U.S. 93, 98,114 S. Ct. 1345, 1349, 128 L. Ed. 2d 13 (1994).

The courts have developed two lines of analysis to determine if a law violates the dormant Commerce Clause. First, the court considers whether the law is facially discriminatory, in its practical effect or purpose. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 98 S. Ct. 2531, 57 L. Ed. 2d 475 (1978). Laws that discriminate against interstate commerce are virtually *per se* invalid unless the municipality can demonstrate, under rigorous scrutiny, that the discriminatory law is justified by a valid factor unrelated to economic protectionism and that no nondiscriminatory alternatives exist which will preserve the local interests at stake. *Hynt [sic] v. Wash. State Apple Adver. Comm 'n,* 432 U.S. 333, 353, 97 S. Ct. 2424, 2446, 53 L. Ed. 2d 383 (1977); *see also Chem. Waste Mgmt., Inc. v. Hunt,* 504 U.S. 334, 342-45,112 S. Ct. 2009, 2013-16,119 L. Ed. 2d 121 (1992). Second, if the law does not discriminate against interstate commerce, the court considers whether the law regulates evenhandedly, having only incidental effects on interstate commerce. "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S.137, 142, 90 S. Ct. 844, 847, 25 L. Ed. 2d 174 (1970). Under *Pike,* the court applies a "balancing test" to determine whether the putative local interests outweigh the burden imposed by the law.

C & A Carbone, Inc. v. Town of Clarkstown

The seminal decision in regard to solid waste flow control ordinances and their impact on the dormant Commerce Clause is *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383,114 S. Ct.1677,128 L. Ed. 2d 399 (1994). In *Car-*

bone, the Town of Clarkstown, New Jersey, wanted to build a transfer station in order to process non-recyclable solid waste. A private contractor agreed to build the facility and run it for five years. During the five year period, the transfer station would be financed by a "tipping fee" collected by the contractor. In addition, the Town of Clarkstown agreed to guarantee a minimum tonnage of solid waste and to pay for any deficiencies between the actual and guaranteed minimum tonnage. Upon expiration of the five-year operating agreement, the contractor agreed to convey the facility to the Town of Clarkstown for one dollar. In an effort to avoid the potential that local taxpayers would be required to pay additional fees to the private operator for solid waste that was never actually delivered, the Town of Clarkstown enacted a flow control ordinance. The flow control ordinance required that all acceptable solid waste generated within the Town of Clarkstown be processed at the new transfer station. C. & A. Carbone, Inc. was cited for violation of the flow control ordinance by exporting solid waste that had been generated within the town's geographic boundaries.

The Supreme Court held that the flow control ordinance enacted by the Town of Clarkstown discriminated against interstate commerce because it permitted only the favored local operator to process waste. The Court reasoned as follows:

> [T]he article of commerce is not so much the solid waste itself, but rather the service of processing and disposing of it.
>
> With respect to this stream of commerce, the flow control ordinance discriminates, for it allows only the favored operator to process waste that is within the limits of the town. The ordinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition ... .

> . . . The essential vice in laws of this sort is that they bar the import of the processing service .... Put another way, the offending local laws hoard a local resource – be it meat, shrimp, or milk – for the benefit of local businesses that treat it.
>
> The flow control ordinance has the same design and effect. It hoards solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility.

Carbone, 511 U.S. at 391-92 (citations omitted). Applying strict scrutiny, the Court further held that the discriminatory flow control ordinance was *per se* invalid since the town could have protected its local interests through nondiscriminatory alternatives. In so holding, the Court reasoned as follows:

> The flow control ordinance does serve a central purpose that a nonprotectionist regulation would not: It ensures that the town-sponsored facility will be profitable, so that the local contractor can build it and Clarkstown can buy it back at nominal cost in five years. In other words, as the most candid of *amici* and even Clarkstown admit, the flow control ordinance is a financing measure. By itself, of course, revenue generation is not a local interest that can justify discrimination against interstate commerce ....
>
> Clarkstown maintains that special financing is necessary to ensure the long-term survival of the designated facility. If so, the town may subsidize the facility through general taxes or municipal bonds. But having elected to use the open market to earn revenues for its project, the town may not employ discriminatory regulation to give that project an advantage over rival businesses from out of State.

Carbone, 511 U.S. at 393-94 (citations omitted).

The Public/Private Distinction

In United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 261 F.3d 245 (2d Cir. 2001) *cert. denied* 534 U.S. 1082 (2002), the district court, applying *Carbone*, held that the counties' flow control laws discriminated against interstate commerce in favor of the authority's designated facilities. The Second Circuit reversed. It found the facts in *Carbone* were distinguishable in that the Clarkstown transfer station was owned by a private contractor while the counties' transfers stations were publicly owned. The court held that:

> [A] flow control ordinance governing the processing of waste is not discriminatory under the Commerce Clause unless it favors local private business interests over out-of-state interests. Flow control regulations . . ., which negatively impact all private businesses alike, regardless of whether in-state or out-of-state, in favor of a publicly owned facility, are not discriminatory under the dormant Commerce Clause.

United Haulers, 261 F.3d at 263.[5] The case was remanded to the district court for a determination of whether the counties' flow control ordinances passed constitutional muster under the *Pike* balancing test.

The majority in *Carbone* did not draw a distinction between publicly and privately owned facilities for purposes of its analysis of the Clarkstown flow control ordinance under the dormant Commerce Clause. Neither has the Fifth Circuit had an occasion to consider the issue. Nonetheless, defen-

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[5] *See also East Coast Recycling, Inc. v. City of Port St. Lucie*, 234 F. Supp. 2d 1259 (S.D. Fla. 2002) (recognizing the distinction between public and private ownership and applying the *Pike* test).

dants invite the Court to embrace the public/private distinction in *United Haulers* and evaluate their flow control ordinances under the less demanding *Pike* test. In the absence of clear and binding precedent supporting the public/private distinction in evaluating the impact of defendants' flow control ordinances on interstate commerce, the majority opinion in *Carbone* controls. It is the opinion of this Court, that the July 2002 flow control ordinances enacted by the Authority, like the flow control ordinance in *Carbone,* discriminate against interstate commerce. The Authority has drawn a ring around itself. Solid waste collected within that ring must be processed at its preferred transfer stations and landfill. These flow control ordinances prevent everyone except the favored local operator from processing solid waste collected within its boundaries and deprives outside access to the local waste disposal market. Consequently, these flow control ordinances hoard "solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility." *Carbone,* 511 U.S. at 392. It is also the opinion of this Court that the defendants have failed to demonstrate that they had no other means to advance their admitted objective: the generation of adequate revenue to meet their financial obligations. In fact, the trial evidence showed that defendants could have promoted financial viability through increases in taxes, through the imposition of franchise fees[6] or by increasing the amount of solid waste processed at its facilities by accepting solid waste from municipalities outside of the Authority. Thus, like the flow control ordinance in *Carbone,* these flow control ordinances are *pre se* [*sic*] invalid.

Moreover, while the parties have stipulated that the Authority *owns* the landfill and transfer stations, the relationship

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[6] During trial, the Authority admitted that an alternative means of generating revenue was the collection of a "franchise fee" granting private solid waste collectors a license to collect solid waste within the Authority's geographic boundaries.

between the Authority and Enviro (the contract operator) makes it difficult to characterize the Authority landfill and transfer stations as a purely public endeavor. *In United Haulers,* the waste management authority owned *and* operated all of its facilities save one transfer station. *United Haulers*, 261 F.3d at 250. The court was also careful to point out that the "current out-sourcing of the transfer station's operation is a temporary measure." *United Haulers,* at 251. In contrast, the Authority has given no indication that it intends to assume the operation of its facilities or that the current system of private operation of its facilities is other than permanent. Enviro's contract with the Authority essentially gives Enviro complete control over the operation and maintenance of the landfill and transfer stations. Enviro provides all of the equipment and personnel. It controls access to the facilities, and operates and maintains the weight scales and records. While the operating contract does not guarantee a minimum amount of solid waste, payments to Enviro are based upon the amount of solid waste delivered to each facility. Defendants' flow control ordinances not only increase the amount of solid waste processed at its facilities, but they insure Enviro an increased stream of solid waste and the ultimate revenue that it generates. When these factors are considered in combination with the fact that Enviro is also in the solid waste collection and disposal business and that its primary competitors are plaintiffs, the economic advantages associated with the flow control ordinances cannot be categorized as purely public. In sum, the nature of the relationship between the Authority and Enviro is clearly distinguishable from the *United Haulers* case.

Finally, this Court notes that defendants' reliance on the *Pike* balancing test to vindicate these flow control ordinances is misplaced. Assuming arguendo that defendants are entitled to rely on the public/private distinction announced in *United Haulers* and that the *Pike* balancing test applies, under the facts in this case, the flow control ordinances would fail to

pass constitutional muster. The concurring opinion in *Carbone is* instructive. Justice O'Connor reasoned that the Town of Clarkstown's ordinance did not discriminate against interstate commerce. *Carbone*, 511 U.S. at 404-05 (O'Connor, J., concurring). However, applying the *Pike* test, Justice O'Connor determined that Clarkstown's flow control ordinance imposed an excessive burden in relation to the putative local benefits. Justice O'Connor concluded:

> That the ordinance does not discriminate against interstate commerce does not, however, end the Commerce Clause inquiry. Even a nondiscriminatory regulation may nonetheless impose an excessive burden on interstate trade when considered in relation to the local benefits conferred. . . . Moreover, "the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Pike*, 397 U.S., at 142, 90 S.Ct., at 847. Judged against these standards, Local Law 9 fails.
>
> The local interest in proper disposal of waste is obviously significant. But this interest could be achieved by simply requiring that all waste disposed of in the town be properly processed *somewhere.* For example, the town could ensure proper processing by setting specific standards with which all town processors must comply.
>
> In fact, however, the town's purpose is narrower than merely ensuring proper disposal. Local Law 9 is intended to ensure the financial viability of the transfer facility. I agree with the majority that this purpose can be achieved by other means that would have a less dramatic impact on the flow of goods. For example, the town could finance the project by imposing taxes, by issuing municipal

> bonds, or even by lowering its price for processing to a level competitive with other waste processing facilities. But by requiring that all waste be processed at the town's facility, the ordinance "squelches competition in the waste-processing service altogether, leaving no room for investment from outside."

Carbone, at 405-07 (O'Connor, J., concurring) (citations omitted).

Likewise, defendants' solid waste flow control ordinances were enacted out of the need to generate additional income in order to meet future financial obligations. The Court recognizes that the Authority's need to generate sufficient income to maintain economic viability constitutes a legitimate public purpose, but it is not a permissible basis for interference with interstate commerce. As noted by the Court in *Carbone*, "[b]y itself, . . . revenue generation is not a local interest that can justify discrimination against interstate commerce." *Carbone*, at 393. As noted above, the Authority could have undertaken alternative steps to insure its economic interests without resorting to solid waste flow control. In addition, defendants introduced no evidence at trial which tended to demonstrate that environmental or public health concerns were the motivating force behind enactment of these flow control ordinances. Thus, even under the less rigorous *Pike* test, defendants' solid waste flow control ordinances fail.

CONCLUSION

It is the opinion of the Court that the solid waste flow control ordinances enacted by the members of the Pine Belt Regional Waste Management Authority affect interstate commerce. It is also the opinion of the Court that these flow control ordinances, like the flow control ordinance in *Carbone,* discriminate against interstate commerce and are *pre se [sic]* invalid. It is also the opinion of the Court that the de-

fendants have failed to demonstrate that they had no other means to advance the local governmental interest.

IT IS THEREFORE ORDERED AND ADJUDGED, that plaintiffs are entitled to Declaratory Relief as stated herein above and that plaintiffs are entitled to a permanent injunction prohibiting the enforcement of the solid waste flow control ordinances enacted by the defendants in July and August of 2002 and subsequently reenacted in September, October and November of 2002.

IT IS FURTHER ORDERED AND ADJUDGED, that all further relief should be, and is hereby denied. The Court shall enter a separate judgement pursuant to Fed. R. Civ. P. 58.

SO ORDERED AND ADJUDGED, this the 23rd day of April, 2003.

[s]
LOUIS GUIROLA, JR.
U.S. MAGISTRATE JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS,
FOR THE FIFTH CIRCUIT

No. 03-60470

NATIONAL SOLID WASTE MANAGEMENT ASSOCIATION; ET AL

Plaintiffs

NATIONAL SOLID WASTE MANAGEMENT ASSOCIATION; BFI WASTE SYSTEMS, BFI Waste systems of Mississippi LLC; WASTE MANAGEMENT OF MISSISSIPPI INC

Plaintiffs – Appellees

v.

PINE BELT REGIONAL SOLID WASTE MANAGEMENT AUTHORITY AND ITS BOARD OF COMMISSIONERS; COVINGTON COUNTY; JONES COUNTY; PERRY COUNTY, CITY OF PETAL; CITY OF LAUREL; CITY OF HATTIESBURG, MISSISSIPPI

Defendants – Appellants

MIKE MOORE

Intervenor-Defendant-Appellant

Appeals from the United States District Court for the Southern District of Mississippi, Hattiesburg

---

ON PETITIONS FOR REHEARING EN BANC

(Opinion 10/29/04, 5 Cir., ____, ____ F.3d ____)

Before GARWOOD, WIENER and DeMOSS, Circuit Judges.

PER CURIAM:

(✓) Treating the Petitions for Rehearing En Banc as Petitions for Panel Rehearing, the Petitions for Panel Rehearing are DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petitions for Rehearing En Banc are DENIED.

( ) Treating the Petitions for Rehearing En Banc as Petitions for Panel Rehearing, the Petitions for Panel Rehearing are DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (Fed. R. App. P. and 5th Cir. R. 35), the Petitions for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

[s]_____
United States Circuit Judge

(2)

Supreme Court, U.S.
FILED
JUN 23 2005
OFFICE OF THE CLERK

No. 04-1333

IN THE

Supreme Court of the United States

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION; BFI WASTE SYSTEMS OF NORTH AMERICA, INC.; BFI WASTE SYSTEMS OF MISSISSIPPI, LLC; AND WASTE MANAGEMENT OF MISSISSIPPI, INC.,

Petitioners,

v.

PINE BELT REGIONAL SOLID WASTE MANAGEMENT AUTHORITY AND ITS BOARD OF COMMISSIONERS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

JIM HOOD
Attorney General State of Mississippi
HAROLD E. PIZZETTA III
MARY JO WOODS
Special Assistant Attorneys General
Office of the Attorney General
Post Office Box 220
Jackson, MS 39205
(601) 359-3825

MORAN M. POPE, III
Counsel of Record
POPE & POPE, P.A.
301 S. 40th Avenue
Suite 4
Hattiesburg, MS 39402
(601) 268-9997

Counsel for Respondents

195079

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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SUMMARY OF THE ARGUMENT

The Court should deny the Petition because the Fifth Circuit Court of Appeals properly examined the standing of the plaintiffs to bring the action below, despite the fact that the issue was not addressed in the district court. Upon examination, the court found, *sua sponte,* that the plaintiff hauling companies did not have standing to argue that the ordinances at issue discriminated against interstate commerce. The haulers were not found to be within the zone of interests protected by the Commerce Clause, because they did not move, or plan to move, waste generated within the jurisdictions of the defendants beyond the borders of Mississippi. Nor did they move, or plan to move, waste generated outside of Mississippi into any of the three cities or three counties named here as defendants.

It is well established that a court cannot properly rule on matters of constitutional significance if it lacks jurisdiction to do so. This is so even where the jurisdictional question arises on appeal, and where, as here, the constitutional issue is more easily disposed of on the merits. The Petitioners attempt to argue the interests of other, hypothetical plaintiffs, who might be capable of showing some tangible interference with their activities in interstate commerce. Nothing in this record demonstrates such interference. These Petitioners simply failed, after both discovery and trial, to establish that their activities in the Pine Belt region were interstate in character, and thus they lacked the prudential standing required to make this argument. The Fifth Circuit correctly declined to reach the merits of the discrimination claim on speculative facts, and reserved its judgment until a proper plaintiff could appear.

The alleged conflict among the circuits on standing jurisprudence is illusory, and is based only upon dicta contained in a discursive footnote in which the Fifth Circuit criticized the factual analysis undertaken by other courts on other facts. Nothing in the ruling below misstates or misapplies the prudential rules of standing in any manner that conflicts with the rulings of the First or Ninth Circuits, or with the precedents of this Court.

The Petition should also be denied because the Court of Appeals properly applied the balancing test set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). The dormant Commerce Clause jurisprudence of this Court has always demanded an examination of the differential impacts of state and local legislation on regulated interests located both within and beyond the borders of the legislating state. Where local legislation serves a legitimate purpose without treating out-of-state interests differently from local interests, this Court has not hesitated to uphold local regulation. Petitioners invite the Court to re-write this most fundamental tenet of Commerce Clause jurisprudence. That invitation should be declined.

Finally, this is not an exceptional case that warrants review. The ordinances at issue here place no burden on the interstate trade in waste services. The ordinances provide the citizens of the Pine Belt region with safe, reliable and economical solid waste disposal, administered by a public agency created specifically to deliver this traditional local government service. The ordinances are applied and enforced even-handedly against all waste haulers working in the region, whether they are based within the State of Mississippi or elsewhere.

STATEMENT OF THE FACTS AND PROCEEDINGS BELOW

In 1989 and 1990, representatives of several South Mississippi cities and counties began meeting together to address the mandates of the federal and state governments concerning the proper disposal of solid waste. A professional engineering firm was retained to assist the group in the development of a thirty (30) year Solid Waste Master Plan for the region.

Over the next approximately two years a Master Plan was developed, the goal of which was "to develop an environmentally-sensitive, cost-effective solid waste management and disposal program for the Pine Belt Region."

Among other things, the Master Plan recommended (a) the creation of a regional solid waste management authority, and (b) the construction of a publicly-owned landfill to be financed through the issuance of revenue bonds. According to the Master Plan, the total approximate annual waste generated within the Authority was 153,734 tons.

In recommending the construction of a single, publicly-owned, regional landfill with transfer stations to "feed" the landfill, the Master Plan discussed alternatives including each city and county having its own disposal facility and the construction of two regional landfills. These alternatives were rejected by the Master Plan because of the cost-effectiveness of a single regional landfill.

The Plan was adopted in July, 1992, by what had by then become the Pine Belt Regional Solid Waste Management Authority ("Pine Belt," "the Authority," or "Pine Belt

Authority"), and was submitted to the Mississippi Department of Environmental Quality for its approval.

The Authority's landfill opened in April, 1997, and has been providing secure and reliable waste disposal to the Pine Belt region ever since. The Authority issued $7.4 million in bonds to finance the start-up costs (engineering and legal) and construct the first "cell" to begin receiving solid waste. In 2000, those bonds were refinanced, and $9.085 million in bonds were issued, because of lower interest rates and to construct a second "cell". At the time of the trial, the Authority had $7.520 million in outstanding bonds.

From a high of 129,017 tons in fiscal year (FY) 2000, the Authority saw a decrease in tonnage to 108,625 tons in FY 2001, and to 95,205 tons in FY 2002. Because the Authority had no source of funds to operate and pay its bonded indebtedness other than the payment of those seeking to dispose of their waste at the Authority's landfill, the Authority's ability to make its July 1, 2004, bond payment was in serious doubt, according to its independent certified public accountant.

Believing that the viability of the Authority's facilities (i.e., its landfill and transfer stations) was in question, the Authority's Board of Commissioners adopted a resolution in July, 2002, directing the cities and counties that comprise the Authority to adopt flow control ordinances.[1] Each of the three cities and three counties did so, with the effective date of the ordinances to be September 1, 2002.

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[1] Stone County, Mississippi, was in the process of being admitted to the Authority at the time of trial, but the Authority did not direct Stone County to adopt a flow control ordinance.

On August 29, 2002, Waste Management of Mississippi, Inc., BFI Waste Systems, and BFI Waste Systems of Mississippi, LLC (hereafter, "Waste Management" and "BFI"), together with Pine Belt Waste Systems, LLC, filed a Complaint for Declaratory, Injunctive and Monetary Relief against Pine Belt and the cities and counties that make up that regional solid waste management authority. The parties agreed that the ordinances would not be enforced until a hearing on the Petitioners' Motion for Preliminary Injunction could be held.

Trial was held in December, 2002, and in April, 2003, the district court granted the relief sought by Waste Management and BFI. Pine Belt and the three cities and counties that had adopted flow control ordinances, together with the Attorney General of Mississippi[2] perfected their appeal to the Fifth Circuit Court of Appeals.

In October, 2003, the Fifth Circuit unanimously dismissed the Petitioners' Complaint in part for lack of standing and reversed and rendered with respect to the remainder; and in January, 2005, that court unanimously denied the Petitioners' Petition for Rehearing.

* * * *

---

[2] The Attorney General of Mississippi had intervened because the Petitioners had arguably challenged the constitutionality of the state statute that permitted regional solid waste management authorities to adopt flow control ordinances "to ensure the viability" of its waste disposal facilities. *See Miss. Code Ann.* § 17-17-319 (Supp. 2004).

REASONS FOR DENYING THE PETITION

I. THE COURT OF APPEALS PROPERLY EXAMINED THE STANDING OF THE PLAINTIFFS BEFORE REACHING THE MERITS OF THE DISCRIMINATION CLAIM

The Petitioners' alleged "conflict" among the Circuits over the prudential requisites for standing in the federal courts is no conflict at all. The language cited by Petitioners as the foundation for this conflict is contained in footnote 16 of the Fifth Circuit's decision (Appendix A to Petition for Writ of Certiorari (hereafter "App.") pp. 14a-15a), which forms no part of the ruling of the Court. It is dicta, reflecting the court's observation that the Ninth Circuit in *On the Green Apartments LLC v. City of Tacoma,* 241 F.3d 1235 (9th Cir. 2001), and the First Circuit in *Houlton Citizens' Coalition v. Town of Houlton,* 175 F.3d 178 (1st Cir. 1999) should properly have considered the jurisdictional questions presented before reaching the merits of the constitutional claims advanced in those cases. All three courts rejected the Commerce Clause challenges to the flow control laws before them, but the Fifth Circuit properly addressed, *sua sponte,* the standing issues raised by the facts developed at trial before reaching the merits of the constitutional claims.

The ruling of the Fifth Circuit in this case was premised on sound Fifth Circuit and Supreme Court precedent. It has long been the practice of this Court not to "'anticipate a question of constitutional law in advance of the necessity of deciding it;'" nor to "'decide questions of a constitutional nature unless absolutely necessary to a decision of the case;'" nor to "'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied;'"

nor to "'pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation.'" *Ashwander v. Tennessee Valley Authority,* 297 U.S. 298, 346-47 (1936) (citations omitted) (Brandeis, J. concurring).

The affirmative obligation of a plaintiff to demonstrate that it has both the Article III and prudential requisites for standing serves a practical purpose: "It tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Bender v. Williamsport Area School Dist.,* 475 U.S. 534, 542 (1986), *quoting Valley Forge Christian College v. Americans United for the Separation of Church and State, Inc.,* 454 U.S. 464, 472 (1982).

> The goal of the prudential standing requirements is to "determine whether the plaintiff 'is a proper party to invoke judicial resolution of the dispute and the court's remedial powers.'" App. at p. 13, *citing Procter & Gamble v. Amway Corp.,* 242 F.3d 539, 560 (5th Cir. 2001) and *Bender v. Williamsport Area School Dist.,* 475 U.S. 534, 545 n.8 (1986).

The key inquiry for prudential standing in turn is "whether the injury of which plaintiffs complain is 'arguably within the zone of interests to be protected' by the dormant Commerce Clause." App. at p. 12a, *citing Ass'n of Data Processing Services v. Camp,* 397 U.S. 150, 153 (1970). On the record below, Petitioners have not shown that their activities in the Pine Belt region are sufficiently connected with interstate commerce to provide the concrete factual context appropriate to constitutional adjudication.

Two salient facts were established at trial in this case. First, the Petitioners do not ship, and have never shipped, waste collected in the Region to any point outside of the State of Mississippi. It is undisputed that Petitioners BFI and Waste Management currently deliver, and would continue to deliver, waste collected in the Region only to landfills elsewhere in Mississippi. Indeed, the complaint in this case did not allege that the local laws at issue would prevent these parties from transporting Regional waste in interstate commerce, merely that they would be prevented from transporting waste to "landfills of their own choosing." At trial, it was conceded that the landfills chosen by Petitioners were all within the state of Mississippi.

Second, the Petitioners did not establish that the operation of the local laws would indirectly affect their operations outside of Mississippi to any greater degree than they would affect their local operations, or that the laws would be enforced differently based upon the citizenship or place of incorporation of an affected waste hauler. Petitioners claimed that they held contracts with different entities which spanned the jurisdictions of several states, and that increased costs within the Region due to the application of the local laws would increase their costs, and reduce their competitiveness, in areas beyond Mississippi. However, Petitioners did not show that out-of-state consumers of their services would not be served as well by other members of the hauling industry even if Petitioners were handicapped to some degree by the operation of the local laws. Petitioners also failed to show that they would be less competitive with respect to other haulers within the Region because the laws would equally apply to all haulers.

These facts would have been fatal to the haulers' discrimination claim had standing been granted. However, rather than reaching that question, the Fifth Circuit looked first to its jurisdictional responsibility. "[E]very federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it." *Steel Company v. Citizens for a Better Environment,* 523 U.S. 83, 95 (1998), quoting *Mitchell v. Maurer,* 293 U.S. 237, 244 (1934).

The Supreme Court in *Steel Company* emphasized that the need to resolve jurisdictional questions is paramount, because without jurisdiction, the Court is without power to adjudicate constitutional issues:

> And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it. [When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit. *Steel Company,* 523 U.S. at 95, *quoting United States v. Corrick,* 298 U.S. 435, 440.

In footnote 16 of its decision, the Fifth Circuit noted that it was logically inconsistent for the Ninth Circuit to find that because the *On the Green* plaintiffs had no intention of shipping waste outside the state of Washington, Tacoma's law "did not implicate the Commerce Clause" and at the same time find that the plaintiffs in *On the Green* fell within the zone of interests protected by the Commerce Clause. It also

took issue with the First Circuit's view that an assertion of general economic interests, without particular reference to interstate trade, was sufficient to bring the *Houlton* plaintiffs within the zone of interests protected by the Commerce Clause.

In both *On the Green* and *Houlton*, the Circuit Courts found the plaintiffs had standing to sue, but then decided against them on the merits. The Court in *On the Green* reviewed the case in the context of a motion to dismiss for failure to state a claim under Federal Rule 12(b)(6). While finding that the plaintiff had standing to challenge Tacoma's requirement that all self-haulers deliver their waste to Tacoma's transfer station, the Court also found that "[b]ecause *On the Green* alleges only that it would deposit its waste in another city in Washington, the Commerce Clause is not implicated." 241 F.3d at 1242. The Court then affirmed the dismissal of the complaint under Rule 12(b)(6).

In *Houlton,* the First Circuit reviewed the case after the district court granted summary judgment to the Town and upheld the local flow control scheme. The Court of Appeals affirmed. The Court first rejected plaintiffs' argument that this Court's decision in *C&A Carbone, Inc. v. Clarkstown,* 511 U.S. 383 (1994), was a blanket prohibition against all flow control laws under any circumstances:

> We do not interpret *Clarkstown* as explicating a broad-based ban on every flow-control ordinance that happens to be coupled with an exclusive contractual arrangement in favor of an in-state operator. *Houlton,* 175 F.3d at 188.

The Court then affirmed the district court's grant of summary judgment under the rationale developed by the Third Circuit in *Harvey & Harvey v. County of Chester,* 68 F.3d 788 (3d Cir. 1995), relying on the fact that the Town Council of Houlton had selected its designated contractor through an open process of competitive bidding, just as, in the instant case, the Pine Belt Authority has chosen its landfill operator through a competitive interstate selection process.

Here, as was arguably the case in *On the Green* and *Houlton*, the same facts that could not support standing would also defeat Petitioners' discrimination claim on the merits. To the extent that the decisions in *On the Green* and *Houlton* failed to seriously discuss the prudential requirements for standing, they may be viewed as examples of the doctrine of "hypothetical jurisdiction" which the Supreme Court has expressly rejected. The doctrine consists of the practice of reaching the merits of an issue despite jurisdictional uncertainty, where "(1) the merits question is more readily resolved, and (2) the prevailing party on the merits would be the same as the prevailing party were jurisdiction denied." *Steel Company,* 523 U.S. at 93.

Consequently, the Fifth Circuit's recognition of the jurisdictional problem raised by Petitioners' inability to allege or prove disruption of interstate shipments of waste was appropriate. Even though Petitioners could not have stated or proven a claim of discrimination under the Commerce Clause, in the absence of jurisdiction, the Court of Appeals lacked the power to make that determination.

Had the Fifth Circuit entertained the question of discrimination despite the lack of any evidence to establish it, the Court would have been forced to speculate as to

hypothetical injuries suffered by hypothetical third parties. These parties, unlike Petitioners, would have shipped waste subject to these ordinances into or out of Mississippi, in speculative amounts, with speculative consequences. Such an exercise would amount to the issuance of an advisory opinion, a practice which this Court has always condemned. *Steel Company,* 523 U.S. at 121-22 (Stevens, J., concurring). Instead, the Court of Appeals wisely elected to defer consideration of the constitutional discrimination claim until a proper plaintiff could be found, which, as this Court has long observed, is the prudent judicial practice.

Finally, if there was error in the decision of the Court of Appeals, the error was to find that Petitioners had standing to argue that the laws presented even incidental burdens on interstate commerce. Only minimal facts were presented by Petitioners to show harm to their own activities in interstate commerce. Both BFI and Waste Management submitted affidavits that claimed the challenged ordinances tended to increase their costs of doing business in Mississippi. These increased costs, it was claimed, would have a "ripple effect" on business conducted in other states, and therefore the local ordinances placed a burden upon Petitioners' interstate commerce. (App., pp. 15a-16a). These burdens were not quantified with proof of loss at trial, but the Court of Appeals found standing based upon the allegation of a burden, ruling that the Petitioners were "arguably within the appropriate zone of interests" and thus eligible to challenge whether the ordinances excessively burdened interstate commerce.

The showing made by Petitioners was little more than a claim that the costs incurred by complying with the regulation could impact an interstate business' bottom line. Such a

showing could be made with respect to any regulation by virtually any interstate business. It would not have been inappropriate for the Fifth Circuit to require more than this. However, the lack of proof of any tangible burden on interstate commerce was recognized by the Court in its decision on the merits.

II. THE FIFTH CIRCUIT'S APPLICATION OF THE PIKE BALANCE PROPERLY SEARCHED FOR DISPARATE IMPACTS ON IN-STATE AND OUT-OF–STATE INTERESTS.

> [T]here is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the category subject to the *Pike v. Bruce Church* balancing approach. In either situation the critical consideration is the overall effect of the statute on both local and interstate activity.

Brown Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573, 579 (1986).

This Court's dormant Commerce Clause jurisprudence has established a two-tiered approach to local regulation. When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, it is considered to be virtually *per se* invalid, *Philadelphia v. New Jersey,* 437 U.S. 617 (1978), except in the rare case where the state has no alternative to achieve its purpose. *Maine v. Taylor,* 477 U.S. 131 (1986). "When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest

is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

Petitioners suggest that the Fifth Circuit has misconstrued the balancing test set forth in *Pike*, by requiring that plaintiffs show some differential treatment of in-state and out-of-state interests in order to establish an incidental burden on interstate commerce. They argue that if a local law is found to "regulate even-handedly," then no disparate impact on in-state or out-of-state interests could exist, and none need be shown to establish an incidental burden on interstate commerce. The suggestion would turn the Court's long-standing two-tiered approach to local regulation on its head.

The flaws in Petitioners logic are apparent and dangerous. First, there can be no presumption that a law found to "regulate even-handedly" must therefore be wholly free of any indirect or latent impacts to interstate commerce. No court could be presumed to be so omniscient in reading the text of a statute.

Second, the presumption that a finding of "even-handed regulation" means the absence of *any* disparate treatment of in-state and out-of-state concerns, implies that *all* disparate impacts of a statute on interstate commerce, however minor, would necessarily constitute discrimination against interstate commerce.

Third, if all disparate impacts on out-of-state interests that might arise from the operation of a local regulation were to be considered "discrimination" against interstate commerce by the courts, then all such regulations would be

"virtually *per se* invalid" and few, if any, would survive the strict scrutiny required by *Maine v. Taylor.* If this were the case, the impact recognized in *Pike* itself, where the application of a facially neutral statute was found to burden commerce indirectly and *as applied* to the party bringing suit, could never have been balanced against the putative benefits of the law.[3] The result would be an evisceration of the *Pike* balance as it has been applied for the past thirty years.

Finally, Petitioners suggest no alternative minimal showing to establish an incidental burden on interstate commerce. If, for example, a multi-state business need only show that a regulation increases the cost of doing business in one state versus another to establish an incidental burden and trigger the balancing test, then there will be no limit to the number of regulations the courts may be called upon to examine for their putative local benefits. This would require the courts to pass judgment on the wisdom and cost of virtually any legislation affecting commerce, and to substitute its judgment for that of the local legislatures, a function which the Supreme Court has held that the judiciary cannot assume. *See Minnesota v. Cloverleaf Creamery,* 449 U.S. 456, 469 (1981).

There is no need for this Court to undertake such a massive re-evaluation of its dormant Commerce Clause jurisprudence. The ruling of the Fifth Circuit established no new definition of "incidental burden" in the context of *Pike.*

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[3] *Pike* involved the application of an Arizona law requiring labels on cantaloupes grown in Arizona. While the court found the law to be neutral on its face, an incidental burden on interstate commerce was found when it was applied to an Arizona farmer who was effectively prohibited from employing a packing plant located in California.

Examination of disparate impacts on in-state and out-of-state commercial activity is a fundamental inquiry where, as here, economic protectionism is alleged to be the constitutional flaw.

In the context of the economic protectionist claim made by Petitioners, the Fifth Circuit adopted the phrasing of the Second Circuit in *Automated Salvage Transp. Inc. v. Wheelabrator Env. Sys. Inc.,* 155 F.3d 59 (2d Cir. 1998), defining incidental burdens as "those burdens on interstate commerce which exceed the burdens on intrastate commerce." (App., p. 18a) The Second Circuit in turn drew its working definition of incidental impacts from *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 471-72, (1981). In *Clover Leaf Creamery,* the Court found that Minnesota's milk packaging law did not discriminate against interstate commerce in either purpose or effect, and viewed the difficulty of out-of-state milk packagers in complying with the law as the incidental burden that it placed on interstate commerce:

> Even granting that the out-of-state plastics industry is burdened *relatively more heavily than* the Minnesota pulpwood industry, we find that this burden is not "clearly excessive" in light of the substantial state interest in promoting conservation of energy and other natural resources and easing solid waste disposal problems . . .

449 U.S. 456, 473 (emphasis added).

Petitioners show no actual conflict among the circuits in the application of *Pike.* Other recognizable burdens on interstate commerce, such as an inappropriate extra-territorial

effect of a state law (*e.g.*, *PSI Net Inc. v. Chapman*, 362 F.3d 227 (4th Cir. 2004)) or inconsistency with federal law or the regulatory regimes of other states (*e.g.*, *Edgar v. MITE Corp.*, 457 U.S. 624 (1982)) require no close analysis of disparate impacts because the difficulty with such laws is not that they are applied unevenly, but that they cannot be obeyed without inherent conflict in other states. Similarly, Petitioners misinterpret cases where courts have found little or no legitimate local benefit from local regulation (*e.g.*, *McNeilus Truck & Mfg. Inc. v. Ohio*, 226 F.3d 429 (6th Cir. 2000)) to eliminate the need to articulate an incidental impact. In cases where economic protectionism is alleged, disparate impact analysis is indispensable.

The phrases "disparate impact" and "disparate treatment" entered the Commerce Clause lexicon most vividly in the Seventh Circuit, in *National Paint & Coatings Assoc. v. City of Chicago*, 45 F.3d 1124 (7th Cir. 1995). With Judge Easterbrook's succinct phrasing, "No disparate treatment, no disparate impact, no problem under the dormant commerce clause," the Seventh Circuit upheld Chicago's anti-graffiti regulations. *Id.* at 1132. Both the Second and Seventh Circuits have repeatedly employed the language used in *National Paint & Coatings* to describe the "bottom-line" showing that is necessary in a Commerce Clause case, but neither Circuit has adopted a substantively different test than that endorsed by the Supreme Court, or any other Circuit.

Indeed the Third, Ninth, and Tenth Circuits have joined the Second, Seventh and Fifth Circuits in defining "incidental burdens" under *Pike* in remarkably similar language. "Thus, where the burden on out-of-state interests rises no higher than that placed on competing in-state interests, it is a burden on *commerce* rather than a burden on *interstate*

commerce," *Old Bridge Chemicals, Inc. v. New Jersey Dep't of Environmental Protection*, 965 F.2d 1287, 1295 (3d Cir. 1992); "[I]ncidental burdens are the burdens on interstate commerce that exceed the burdens on intrastate commerce," *Pacific Northwest Venison Producers v. Smitch*, 20 F.3d 1008, 1015 (9th Cir. 1994), *citing New York State Trawlers Assoc. v. Jorling*, 16 F.3d 1303, 1308 (2d Cir. 1994); "The 'incidental burdens' of the *Pike* inquiry 'are the burdens on interstate commerce that exceed the burdens on intrastate commerce,'" *V-1 Oil Company v. Utah State Department of Public Safety*, 131 F.3d 1415, 1425 (10th Cir. 1997).

The Third Circuit specifically addressed and rejected the argument that simple excess costs can be a burden in *Norfolk Southern Corporation v. Oberly*, 822 F.2d 388 (3d Cir. 1987):

> The district court found a material dispute of fact with respect to the "putative benefits" side of the balance, pointing to disputes over the magnitude and environmental consequence of predicted coal spills and dust emissions. 632 F. Supp. at 1242-43. We conclude that it is unnecessary to review this conclusion because the record reveals no legally relevant burden on interstate commerce that could be found to be "excessive."
>
> *The "incidental burden on interstate commerce" appropriately considered in Commerce Clause balancing is the degree to which the state action incidentally discriminates against interstate commerce relative to intrastate commerce.* It is a comparative measure. There concededly is language suggesting that any increased costs

> imposed on out-of-state interests, in an absolute sense, are relevant burdens regardless of whether the same costs are imposed on in-state interests. However, we find that the holdings of the Supreme Court case law, consistent with the anti-protectionism purpose of the Commerce Clause, apply the much narrower comparative burden concept. As earlier noted, virtually all state regulation involves increased costs for those doing business within the state, including out-of-state interests doing business in the state as well as in-state interests. In this absolute sense, virtually all state regulation "burdens" interstate commerce. Where the "burden" on out-of-state interests is no different from that placed on competing in-state interests, however, it is a burden on *commerce* rather than a burden on *interstate* commerce. In such cases, nothing in Commerce Clause jurisprudence entitles out-of-state interests to more strict judicial review than that to which the in-state interests are entitled, i.e., arbitrary and capricious review under the Due Process Clause and rational basis review under the Equal Protection Clause, neither of which involves the kind of social value balancing that Norfolk Southern urges us to undertake. [Emphasis added.] 822 F.2d at 406.

Here, the Court of Appeals identified the economic vitality of the Pine Belt landfill as a legitimate public purpose. (App., p. 17a). The municipalities and counties of the Pine Belt Authority take a more expansive view of the benefits of the local laws, and would stress the environmental security provided by the landfill itself as the primary public

purpose advanced by these laws. Nevertheless, the Fifth Circuit need not have made reference to other benefits because under *Pike,* if no incidental burden on interstate commerce is established, any legitimate purpose will tip the balance in favor of the challenged legislation. The Court's inquiry logically and properly ends with a finding that there is neither discrimination nor an incidental burden on commerce. *Nat'l Electrical Manufacturers Ass'n v. Sorrell,* 272 F.3d 104 (2d Cir. 2001); *Brown & Williamson Tobacco Corp. v. Pataki,* 320 F.3d 200 (2d Cir. 2003); *Freedom Holdings v Spitzer*, 357 F.3d 205 (2d Cir. 2004); *Norfolk Southern Corp. v. Oberly*, 822 F.2d 388 (3d Cir. 1987); *National Paint & Coatings Association v. City of Chicago*, 45 F.3d 1124 (7th Cir. 1995); *BFI Waste System of North Am. v. Dekalb County*, 303 F. Supp. 2d 1335 (N.D.Ga. 2004). Because Petitioners failed to show any incidental burden, it was unnecessary for the Court of Appeals to engage in an exhaustive review of the benefits of the local laws.

III. THE CONSTITUTIONAL ISSUES SUGGESTED BY THE PETITION ARE RAISED IN AN ABSTRACT CONTEXT UNRELATED TO THE FACTS OF THE CASE

The Petitioners invite the Court to engage in a broad review of both the scope of the zone of interests test as a prudential requirement for standing, and to greatly expand and re-define the concept of an incidental burden on commerce under *Pike v. Bruce Church, Inc.* Petitioners suggest that conflicts among the circuits with respect to the zone of interests test "may be attributable to a certain lack of clarity in this Court's zone of interests case law." (Petition, p. 11) Similarly, Petitioners urge that *Pike v. Bruce Church, Inc.* be re-interpreted to eliminate the need for courts to

compare the intrastate and interstate impacts of a local regulation to determine whether an incidental burden on interstate commerce is present.

Even if this Court believes that its zone of interest case law requires clarification, or that it should re-examine the nature of incidental burdens on interstate commerce, this case contains neither the record nor the briefing below to support an appropriate inquiry into either issue.

This case came to the district court as a challenge to local waste ordinances under the purported authority of *C&A Carbone, Inc. v. Town of Clarkstown,* 511 U.S. 383 (1994). The defendant cities and counties argued that the facts of this case were distinguishable from those present in *Carbone*, and that the matter should have been decided under the analysis performed by the Second Circuit Court of Appeals in *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Authority,* 261 F.3d 245 (2d Cir. 2001), *cert. denied,* 534 U.S. 1082 (2002). In addressing a similar set of local laws, the Second Circuit found no discrimination against interstate commerce because the facilities benefited by the laws were publicly owned, distinguishing the factual situation in *Carbone.*[4] Here, as in *United Haulers,* the regional landfill to which waste is directed is a public facility, operated by a private contractor chosen through competitive bidding.

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[4] The *United Haulers* court remanded the matter to the district court for application of the *Pike* balancing test. The district court ruled in March 2005 that the laws did not place an incidental burden on interstate commerce and granted summary judgment to the defendant municipalities. That decision is currently on appeal to the Second Circuit.

The parties in the case at bar tried the case on the public/ private distinction recognized in *United Haulers*. The district court noted that the Fifth Circuit had not addressed the issue, and in the absence of binding precedent, held that the laws discriminated against interstate commerce, citing *Carbone*. 261 F. Supp. 2d 644, 649-650 (S.D.Miss. 2003). The parties briefed and argued the public/private distinction in the Court of Appeals, but the Court did not reach the issue of discrimination because it found the Petitioners lacked standing to raise it. Neither party below argued for any new formulation of the *Pike* balance.

The Fifth Circuit examined the standing of Petitioners *sua sponte*, and while this examination was appropriate, it was fact-specific to the record below, and totally unsuited to the breadth of review of the zone of interests test suggested by Petitioners. For example, the record is devoid of evidence to indicate that either the parties or the Court considered for a moment the different roles for the zone of interest test in cases brought under the Administrative Procedure Act and those brought in non-APA cases. (Petition, p. 11). Even if there is a question as to "what role remains for the zone of interest test in constitutional cases" this case is not the one to answer it.

> While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the courts of appeal is judicial, not simply administrative or managerial. Resolution here [of this issue] can await a day when the issue is posed less abstractly. *The Monrosa v. Carbon Black Export, Inc.*, 360 U.S. 180, 184 (1959).

The Court should defer the resolution of any perceived conflict among the courts of appeal on the zone of interests test until it is presented with a case in which the parties and the lower courts have addressed the zone of interests test in a concrete context.

The Commerce Clause issues raised by Petitioners are similarly abstract, if not simply too far-fetched for consideration. As shown above, the application of the balancing test in *Pike v. Bruce Church, Inc.* by the Court of Appeals was not a departure from any generally recognized principle of commerce clause jurisprudence, but a fact-specific application of well-know analytical principles to the facts developed at trial. Petitioners did not succeed in meeting the ordinary standard for balancing the burdens on interstate commerce against the benefits of the challenged legislation, so they now ask the Court to adopt a new standard. What that standard might be is unclear, except that it would not require much consideration of geography, state sovereignty, in-state economic impacts, or out-of-state economic impacts.

The decision here represents no new law in dormant commerce clause jurisprudence. The Court of Appeals simply applied well-established law to unique facts. Nothing in this record compels an over-haul of the Court's time-tested two-tiered analysis.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

MORAN M. POPE, III
Counsel of Record
POPE & POPE, P.A.
301 S. 40th Avenue, Suite 4
Hattiesburg, MS 39402
(601) 268-9997

JIM HOOD
Attorney General State of Mississippi
HAROLD E. PIZZETTA III
MARY JO WOODS
Special Assistant Attorneys General
Office of the Attorney General
Post Office Box 220
Jackson, MS 39205
(601) 359-3825

Counsel for Respondents

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No. 04-1333

In the Supreme Court of the United States

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION; BFI WASTE SYSTEMS OF NORTH AMERICA, INC.; BFI WASTE SYSTEMS OF MISSISSIPPI, LLC; AND WASTE MANAGEMENT OF MISSISSIPPI, INC.

Petitioners,

v.

PINE BELT REGIONAL SOLID WASTE MANAGEMENT AUTHORITY AND ITS BOARD OF COMMISSIONERS, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY BRIEF

CHARLES A. ROTHFELD
Counsel of Record
EVAN M. TAGER
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

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PETITIONERS' REPLY BRIEF

Respondents vigorously defend every aspect of the Fifth Circuit's analysis – except for that Court's candid acknowledgement that its decision on standing cannot be reconciled with the holdings of two other courts of appeals. Yet the existence of that conflict, which involves an important and recurring issue, is not fairly debatable. At the same time, respondents are able to deny the existence of a division in the circuits concerning the meaning of *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970), only by wholly ignoring most of the decisions that reject the test applied by the Fifth Circuit in this case. In short, respondents' merits-focused brief fails to offer any plausible reason why the Court should decline to resolve the two significant conflicts among the circuits identified in the petition.

A. The Fifth Circuit's Standing Decision Conflicts With Those Of Other Courts Of Appeals

1. The court below expressly recognized that its decision on standing departs from the holdings of the First and Ninth Circuits in *Houlton Citizens' Coalition* v. *Town of Houlton*, 175 F.3d 178 (1st Cir. 1999), and *On the Green Apartments LLC* v. *City of Tacoma*, 241 F.3d 1235 (9th Cir. 2001). See Pet. App. 14a-15a n.16. In nevertheless maintaining that the circuits are not really in conflict on the meaning of the zone of interests doctrine, respondents do not deny that the factual settings in *Houlton* and *On the Green Apartments* were identical to the one here: in those cases, as in this one, plaintiffs challenged the constitutionality of flow control ordinances even though the plaintiffs were not shipping waste across state lines at the time of the litigation. See Pet. 9. Instead, respondents insist that the Fifth Circuit's recognition of a conflict was "dicta, reflecting the court's observation that the Ninth Circuit * * * and the First Circuit * * * should properly

have considered the jurisdictional questions presented before reaching the merits of the constitutional claims advanced in those cases." Br. in Opp. 6. Respondents add that the decisions of the First and Ninth Circuits "may be viewed as examples of the doctrine of 'hypothetical jurisdiction.'" *Id.* at 11. This contention, however, is wrong on every count.

To begin with, there was nothing in the least "hypothetical" about the First and Ninth Circuit's resolution of the standing question: those courts expressly and inarguably held that the plaintiffs satisfied the zone of interests test before turning to resolve the merits of the Commerce Clause claims. In a section of its opinion labeled "STANDING" (*Houlton*, 175 F.3d at 182-183), the First Circuit specifically held that that the plaintiff "avoids any concerns relative either to *jus tertii* * * * or to the zone of interests requirement." *Id.* at 183. The court added that the plaintiff's "claim to standing is not damaged because he failed to allege that he hauled garbage out-of-state or planned to do so. * * * [A]n in-state business which meets constitutional and prudential requirements due to the direct or indirect effects of a law purported to violate the dormant Commerce Clause has standing to challenge the law." *Ibid.* Similarly, in *On the Green Apartments* the Ninth Circuit explained that it "must first consider whether [plaintiff] has standing to challenge this provision of the law" (241 F.3d at 1240) before holding, after considerable analysis, that the plaintiff "has satisfied the prudential element of standing with respect to its challenge to Tacoma's 'flow control' requirement." *Id.* at 1241.[1]

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[1] There can be no doubt that the Ninth Circuit was well aware of its obligation to resolve the question of standing before turning to the merits: after explaining that the plaintiff's "'complaint must fall within the zone of interests to be protected or regulated by the' Commerce Clause" (241 F.3d at 1239 (citation and internal quotation marks omitted by the court)), the court held that the plaintiff

Nor did the court below criticize the First and Ninth Circuits on the ground that they "should properly have considered the jurisdictional questions presented before reaching the merits of the constitutional claims advanced in those cases," as respondents assert. Br. in Opp. 6.[2] To the contrary, the Fifth Circuit criticized the other courts for giving the *wrong answer* to the jurisdictional question. After describing in detail the holdings of the First and Ninth Circuits that the plaintiffs in *Houlton* and *On the Green Apartments* had standing, the Fifth Circuit explained that its "conclusion that plaintiffs [in this case] do not meet the prudential standing requirement differs from that in two opinions from our sister circuits," taking specific pains to "disagree" with the determination of the First and Ninth Circuits that "the plaintiffs met the prudential standing requirements." Pet. App. 14a-15a n.16. This clear and acknowledged conflict in the courts of appeals cannot be wished away.

2. Respondents get no farther by contending that "Petitioners have not shown that their activities in the Pine Belt

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lacked standing to contend that "it is forced to pay for waste disposal services it would like to provide for itself" because that "injury is unrelated to the purposes animating the dormant Commerce Clause." *Id.* at 1239-1240. The court accordingly did not reach the merits of that aspect of the plaintiff's challenge to the Tacoma flow control ordinance. See *id.* at 1240.

[2] Respondents are wrong in asserting that the court below "criticized the factual analysis undertaken by other courts on other facts." Br. in Opp. 2. The Fifth Circuit said nothing at all about the "factual analysis" engaged in by other courts; it criticized the Ninth Circuit because (it believed) that court misunderstood the zone of interests test (see Pet. App. 14a n.16), and rejected the holding of the First Circuit because (it believed) that court "viewed too broadly the zone of interests protected by the dormant Commerce Clause." *Id.* at 15a n.16. These criticisms are wholly legal in nature.

region are sufficiently connected with interstate commerce to provide the concrete factual context appropriate to constitutional adjudication." Br. in Opp. 7. See *id.* at 8-9, 11-12. This argument, which amounts to a defense of the merits of the Fifth Circuit's standing analysis, does not offer a reason for this Court to decline to resolve the significant conflict in the circuits over the meaning of the zone of interests test. After all, the First and Ninth Circuits rejected precisely the approach to standing that is now advocated by respondents.

In any event, respondents simply disregard the showing made in the petition (at 12-15) that the Fifth Circuit's analysis (and respondents' current argument) misunderstands the purposes of the zone of interests test. As we have explained, standing is appropriate when, as here, the plaintiff is "itself the subject of the contested regulatory action" (*Clarke* v. *Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987)) and seeks to advance the constitutional "objectives." *Id.* at 397 n.12. And petitioners did not ask the court "to speculate as to hypothetical injuries suffered by third parties," as respondents assert (at Br. in Opp. 11-12); petitioners want to settle their *own* entitlement to ship waste across state lines so that they are able to respond immediately when changes in circumstances or market conditions dictate that course. Although we made this point in the petition (at 13), respondents offer no response.[3]

3. Finally, respondents do not deny that the law relating to the zone of interests requirement is confused and requires clarification by this Court. See Pet. 8, 11-12. That point

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[3] Respondents' argument that petitioners' failure to transport Pine Belt waste across state lines at the time of trial "would have been fatal to [their] discrimination claim had standing been granted" (Br. in Opp. 9) misses the whole point of the current argument; petitioners seek standing to argue discrimination against interstate commerce *even though* they had not yet had occasion to move waste from the Pine Belt jurisdictions across state lines.

seems inarguable: the conflict among the courts of appeals that is presented here graphically demonstrates that the current state of confusion regarding the zone of interests doctrine has "left the lower courts somewhat rudderless and * * * produced a system in which different categories of plaintiffs receive unfairly differing treatment." Siegel, *Zone of Interests*, 92 GEO. L.J. 317, 341 (2004). And respondents are wrong in contending that the record in this case is somehow inadequate to permit "an appropriate inquiry" into the zone of interests issue. Br. in Opp. 21, 22-23. The relevant facts about the nature of petitioners' business operations are undisputed; respondents do not, and could not, identify *any* respect in which the record here is incomplete or in which the standing issue could be presented in a more "concrete context." *Id.* at 23.

Respondents' real complaint appears to be that, because the issue of standing was raised by the court of appeals *sua sponte*, it was not fully briefed below. See Br. in Opp. 22. But the standing question was addressed at length and in detail by the court of appeals, which carefully considered and rejected the contrary approaches taken by other circuits. The Fifth Circuit then declined to reconsider the issue, after briefing by both parties, when petitioners sought rehearing. In similar circumstances, when a court of appeals decides an important jurisdictional issue on its own motion, this Court has not hesitated to grant review. See, *e.g.*, *Wachovia Bank, Nat'l Ass'n* v. *Schmidt*, No. 04-1186 (cert. granted June 13, 2005). The same course is appropriate here.

B. The Conflict In The Circuits Regarding The Meaning Of The Pike Test Warrants Review

1. As we showed in the petition (at 17-20), the courts of appeals also are divided on how to apply the balancing approach of *Pike* v. *Bruce Church, Inc.* In this case, the court below followed the Second Circuit in holding that the *Pike*

test comes into play only if the challenged state regulation has a disparate impact on interstate commerce.[4] In contrast, the Eighth, Fourth, Sixth, and Tenth Circuits have held that the *Pike* principle will invalidate evenhanded state laws when the burdens imposed on interstate commerce greatly exceed the local benefits, even if those laws do *not* have a disparate impact on interstate commerce. As we also showed, the choice of one or the other of these standards often will be outcome-determinative.

Although respondents deny that the courts of appeals are in conflict on the meaning of *Pike* (Br. in Opp. 16-17), they make absolutely no attempt to explain away the decisions of the courts that reject the Fifth Circuit's approach. Respondents thus do not cite, let alone attempt to distinguish, the holdings of the Eighth Circuit – including one that applied *Pike* to invalidate a flow control ordinance that was essentially identical to the Pine Belt ordinances upheld in this case. See Pet. 18-19 (citing *U & I Sanitation* v. *City of Columbus*, 205 F.3d 1063 (8th Cir. 2000), and *R & M Oil & Supply, Inc.* v. *Saunders*, 307 F.3d 731 (8th Cir. 2002)). Nor do respondents acknowledge or attempt to distinguish decisions of the

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[4] We noted that the Seventh Circuit uses a similar approach. Pet. 18 n.8. Respondents maintain that the Third, Ninth, and Tenth Circuits also require demonstration of a disparate effect on interstate commerce before the *Pike* test comes into play. Br. in Opp. 17-19. We take issue with respondents' reading of some of these decisions: the Ninth Circuit opinion cited by respondents indicated only that state regulations "arguably" are not subject to invalidation under the Commerce Clause when, among other things, they do not "fall more heavily on out-of-state interests" (*Pacific Northwest Venison Producers* v. *Smitch*, 20 F.3d 1008, 1015 (9th Cir. 1994)); the Tenth Circuit's rule is addressed below, at note 5. In any event, however, respondents' interpretation of these decisions serves only to confirm the breadth of the conflict and depth of the confusion in the courts of appeals.

Tenth Circuit that found *Pike* applicable even in the absence of a disparate impact on interstate commerce. See Pet. 20 (citing *Blue Circle Cement, Inc.* v. *Board of County Comm'rs*, 27 F.3d 1499 (10th Cir. 1994), and *A.C.L.U.* v. *Johnson*, 194 F.3d 1149 (10th Cir. 1999)).[5] And while respondents refer to the decisions of the Fourth and Sixth Circuits that are cited in the petition (see Br. in Opp. 17), they simply ignore the relevant portions of those holdings, which indicate that the *Pike* doctrine may invalidate a neutral and nondiscriminatory state law when "the burdens it imposes on interstate commerce are excessive in relation to the local benefits it confers." *PSINet, Inc.* v. *Chapman*, 362 F.3d 227, 240 (4th Cir. 2004).[6] This conflict, involving a recurring issue of great importance, warrants review by this Court.

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[5] Respondents do cite *V-1 Oil Co.* v. *Utah State Dept. of Pub. Safety*, 131 F.3d 1415, 1425 (10th Cir. 1997), as endorsing the Second Circuit's approach. Br. in Opp. 18. But they misread *V-1 Oil*. Although the Tenth Circuit quoted a snippet from a Second Circuit decision for the proposition that "[t]he incidental burdens of the *Pike* inquiry 'are burdens on interstate commerce that exceed the burdens on intrastate commerce'" (131 F.3d at 1425 (citation omitted)), it immediately went on to add that "[s]uch incidental burdens might *also*" include such things as "'the disruption of [interstate] travel and shipping due to a lack of uniformity in state laws.'" *Ibid.* (citation omitted). Indeed, although there was no showing of a disparate impact on interstate commerce in *V-1 Oil*, the Tenth Circuit engaged in a lengthy balancing inquiry (see *id.* at 1424-1427) before upholding the challenged law because the burden imposed on interstate commerce was not "'clearly excessive' under *Pike*." *Id.* at 1427 (quoting 397 U.S. at 142).

[6] Respondents dismiss *PSINet* as turning on "an inappropriate extra-territorial effect of a state law." Br. in Opp. 16-17. But that was an alternative holding; the Fourth Circuit also expressly held that, even if the challenged state law were construed to reach only in-state activity, it would be invalid "because the burdens it imposes on interstate commerce are excessive in relation to the local bene-

2. Respondents also are incorrect in arguing that the Fifth Circuit's analysis is consistent with this Court's decisions. As we showed in the petition (at 15-17), this Court never has indicated that a finding of disparate impact on interstate commerce is an element of the *Pike* analysis; respondents are unable to cite any decision of this Court standing for such a proposition.[7] Indeed, as we also noted in the petition (at 16-17), Justice O'Connor concluded that the flow control ordinance challenged in *C & A Carbone, Inc.* v. *Town*

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fits it confers." 362 F.3d at 240. Respondents similarly assert that *McNeilus Truck & Manufacturing, Inc.* v. *Ohio*, 226 F.3d 429 (6th Cir. 2000), is inapposite because the Sixth Circuit there "found little or no legitimate local benefit from local regulation." Br. in Opp. 17. But that observation would seem to prove our point: the Sixth Circuit held that, even if a state law is nondiscriminatory, it will be struck down when "the burden it imposes is 'clearly excessive in relation to the putative local benefits.'" 226 F.3d at 444 (quoting *Pike*, 397 U.S. at 142).

[7] *Minnesota* v. *Clover Leaf Creamery*, 449 U.S. 456 (1981), which is cited by respondents at Br. in Opp. 16, supports our understanding of *Pike*. The Court there explained that, "[e]ven if a statute regulates 'evenhandedly,' and imposes only 'incidental' burdens on interstate commerce, the courts must nevertheless strike it down if 'the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'" 449 U.S. at 471 (quoting *Pike*, 397 U.S. at 142). After observing that the challenged Minnesota law "does not discriminate between interstate and intrastate commerce," the Court applied the *Pike* balancing test, upholding the law because "the burden imposed on interstate commerce is relatively minor" and the "local benefits ample." *Id.* at 472-473. In the course of this analysis, the Court observed that, given the substantiality of the state interest, the law would be upheld even if it were assumed that out-of-state industry "is burdened relatively more heavily" than in-state business. *Id.* at 473. But the Court plainly did not regard such a finding of disparate impact to be a prerequisite to application of the *Pike* test.

of Clarkstown, 511 U.S. 383 (1994), was unconstitutional under *Pike*, even though that ordinance operated identically on in-town and out-of-town waste processors. See *id.* at 404-405 (O'Connor, J., concurring in the judgment). Respondents make no response to this point, which is flatly inconsistent with their submission.

In this regard, we note that respondents' discussion of *Pike* misstates our position. We certainly do not suggest that facially neutral state laws can never have disparate, adverse practical effects on interstate commerce. See Br. in Opp. 14. We do not maintain that any disparate effect of a state regulation on interstate commerce, "however minor," would be "'virtually *per se* invalid.'" *Id.* at 14-15. And our understanding of *Pike* does not invite challenges to "virtually any legislation affecting commerce" (*id.* at 15); potential plaintiffs, who must shoulder the burden of demonstrating the invalidity of state law under *Pike*, have no incentive to bring insubstantial lawsuits – and they have not done so in those circuits where our (and, we submit, the proper) understanding of *Pike* prevails. But however that may be, the courts of appeals are in conflict, the issue is an enormously important one, and guidance from this Court is needed. Further review accordingly is in order.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit should be granted.

Respectfully submitted.

JOHN G. CORLEW
VIRGINIA T. MUNFORD
Watkins & Eager PLLC
Post Office Box 650
Jackson, MS 39205
(601) 948-6470

CHARLES A. ROTHFELD
Counsel of Record
EVAN M. TAGER
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

JOHN VAN GESSEL
Group General Counsel
Waste Management
2859 Paces Ferry Road
Suite 1600
Atlanta, GA 30339
(770) 805-3350

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